The Law Commission

Family Law
Review of Child Law:
Custody

Supplement to
Working Paper No. 96

Custody Law in Practice in the Divorce and Domestic Courts

by J. A. Priest and J. C. Whybrow

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The views expressed herein are those of the authors and not those of the Law Commission.

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CORRECTION
Page 84, para 7.20, line 1 1,053 should read 1,503

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PART I

INTRODUCTION

1.1 This Supplement aims to give an up-to-date picture of the orders made in respect of children in the three largest custody jurisdictions. The information collected is intended to complement the analysis of the law contained in the Working Paper on Custody.[1] Specifically, we examine the award of custody and access on divorce, in proceedings between parents under the Guardianship of Minors Act 1971 and between spouses under the Domestic Proceedings and Magistrates' Courts Act 1978.

1.2 In Part II we look at the background to applications to domestic and county courts which result in custody orders and Part III considers the role of the court in raising the issue of custody. Part IV analyses the available statistics on the award of custody between parents and spouses and discusses a number of factors underlying the figures. In particular the prevalence of orders giving custody to women is considered. In Part V we turn to regional differences in the use by the divorce courts of their power to award joint custody. The effect of a joint custody order on the residence of the children involved is also examined. This Part ends by looking at the use by courts, other than divorce courts, of the power to order that the parent or spouse who is not living with the child retains some or all of the parental rights and duties jointly with the person caring for the child. The subsequent Parts deal with court practice in respect of access orders, custody orders in favour of non-parents, committals to local authority care and supervision orders. Where necessary, graphs, tables and maps have been collected in the Appendix.

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1 (1986) Working Paper No. 96.

(a) County Courts

1.3 1985 was the first year in which records of custody and access orders made by the divorce courts were compiled from court returns by the Lord Chancellor's Department. We draw upon these statistics and the more detailed returns of ten courts which were supplied to us over a three month period during that year giving information concerning nearly 3,000 children subject to custody orders.[2] These courts were selected, in the light of the national returns, to give a fuller picture of the practice of a set of contrasting courts.[3] Additionally, during early 1986 we carried out eleven interviews with judges who regularly deal with children's cases. Most of the interviews were conducted in courts other than (but with broadly similar results to) those which took part in our three month survey. All but one of the judges were male and, except in one court, they were interviewed separately.

1.4 County court returns of orders made under the Guardianship of Minors Act 1971 were also collected by the Department in 1985. Again, we supplemented these statistics with a more detailed survey of ten courts,[4] although the quantity of business was small. Interviews with three judges were carried out to shed some light on the numerical trends.

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2 The survey returns were collected by different methods: in several cases they were collected for us by the courts concerned, in others copies of orders made were supplied to us and, in the remainder, we visited the courts to take information from the files.

3 The courts which took part were those at Aldershot and Farnham, Altrincham, Bow, Exeter, Durham, Guildford, Manchester, Middlesbrough, Wandsworth and the Principal Registry of the Family Division.

4 All but two of these courts were the same as those which took part in the divorce survey: Cambridge replaced Exeter and Lambeth replaced Bow.

(b) Domestic Courts

1.5 The domestic court survey was conducted over a three month period of 1985 in a region where the rate of recourse to domestic courts is amongst the highest in the country.[5] The survey had two main aims. First, it set out to examine the treatment and outcome of individual cases involving children. Information was obtained by means of individual case returns. Record was made of every case heard during the survey period, a total of 345 applications under the 1971 and 1978 Acts. Although the total number of cases is relatively small and the survey was restricted to one part of the country, it provides the first available detailed information about the award of custody in domestic courts. Secondly, the survey aimed to add considerably to the information given by official returns in respect of domestic court business and thus to provide a more detailed picture of the pattern of use of domestic courts. This information was obtained by means of weekly returns, based loosely on the annual returns which each court is required to make to the Home Office.

1.6 Interviews were conducted with ten magistrates drawn from the domestic panels of five of the six courts which took part in the survey. Three pairs of magistrates were interviewed, the other four individually. Six women magistrates were interviewed and four men. These interviews took place in September and October 1985.

(c) Solicitors' Interviews

1.7 Interviews were conducted with 26 solicitors practising in the domestic courts which participated in the survey. The solicitors varied in age and experience. As regards the selection of solicitors to be

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5 The participating courts were: Darlington, Durham, Hartlepool, Sedgefield, Sunderland and Teesside.

interviewed, suggestions were obtained by means of impromptu telephone calls to clerks to the justices in the survey courts. It was hoped that by this means a sample would be obtained whose main common characteristic was regular attendance at the domestic court.

1.8 Many of the questions to solicitors were concerned with the attitudes and behaviour of lay clients and it may be important to note the influence of regional factors. Certainly, most solicitors interviewed in the North East at some point mentioned certain characteristics of the region which they regarded as potentially significant in relation to the matters under discussion. Thus, frequent reference was made to the current high levels of unemployment in the North East, and to continuing working-class adherence to sex-role stereotypes traditionally associated with the heavy industries and physically demanding labour on which the region formerly depended. In view of these perceptions on the part of solicitors and the relatively heavy use of magistrates' courts in the North East,[6] nine interviews were conducted for comparative purposes in Plymouth and East Cornwall. As in the North East, the selection of solicitors was by means of suggestions obtained from clerks to the justices. Interviews in the North East were conducted in the period from March to May 1985, and in the South West in July and August 1985.

1.9 Thus, it can be seen that our information is based on analysis of statistical returns, relatively small samples from court files and interviews with a selection of legal practitioners. The court surveys provide only examples of certain courts' results over a short period of time and might not be indicative even of these courts' usual practices or representative of the region in which they work. Moreover, in the field

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6 See paras. 2.16 - 2.17.

of custody and access, where decisions depend on what is 'best' for the child[7] and turn on the facts of each case, it is not possible to draw firm conclusions about the courts' approaches. We have not been able to examine individual cases in depth. Finally, the interviews carried out can only provide accounts of the impressions of the practitioners involved. Nevertheless, we hope that the results in our paper form a helpful addition to existing research by drawing attention to issues of current and practical importance.

1.10 In this paper we have not found it necessary to distinguish between the effect of 'custody' orders made on divorce and 'legal custody' orders made under the 1971 and 1978 Acts. According to the solicitors interviewed, clients do not appreciate any difference between the two concepts. The solicitors' view was that the distinction between custody and legal custody is largely theoretical.[8]

1.11 We would like to express our gratitude for the assistance given to us in the preparation of this paper. In particular we would like to thank the President of the Family Division and the Lord Chancellor's Department for granting us permission to approach the judiciary and giving access to court records. We are indebted to the judges, magistrates and solicitors who participated in our study for generously giving up their time and providing invaluable information. Thanks are also due to the staff of the Statistical Branch of Lord Chancellor's

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7 See Part VI of the Working Paper.

8 See ibid., paras. 2.34 - 2.54; the distinction between joint custody and orders for the retention of parental rights seems to be more meaningful in practice: see paras. 5.41 - 5.45 below.

Department and in individual county and magistrates' courts who supplied much of our material and put up with our questioning. Most of all we are grateful to the Law Commission for setting up this exercise and in particular to Brenda Hoggett, the Law Commissioner in charge of family law, for her guidance.

PART II

WHO USES THE 1971 AND 1978 ACTS AND WHY?

2.1 Domestic courts make around 18,000 custody and access orders each year.[1] Half of these are made following proceedings between spouses for maintenance under the Domestic Proceedings and Magistrates' Courts Act 1978 ('the 1978 Act'); in such proceedings the court is required to consider whether to make a custody order.[2] The remainder of these orders are made following applications for custody and access under the Guardianship of Minors Act 1971 ('the 1971 Act'). Additionally, in 1985, 2,336 custody and access orders were made by county courts under the 1971 Act.[3] This Part sets out the use made of the 1978 and 1971 Acts during our survey and considers what may prompt these applications. At the end of this Part we note regional differences both in the number of applications made and in the choice of court to which application is made under the 1971 Act.

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1 Excluding interim orders, Home Office Statistical Bulletin 24/85, Table 2. It is likely that each case in which custody and/or access was ordered has been counted as one return. However rare cases in which children are split up between their parents may have been counted as two orders. More generally, each order may relate to more than one child so that the exact number of children involved is not known.

2 Section 8(1) and (2).

3 1,757 of which were custody orders (with or without access), 558 were orders for access in favour of a parent of the child and 21 were access orders in favour of grandparents (figures supplied by the Lord Chancellor's Department). These figures do not include orders made by the Principal Registry of the Family Division, which also has High Court jurisdiction under the 1971 Act, and made 9 orders under that Act in 1984: Judicial Statistics Annual Report 1984 (1985) Cmnd. 9599, Table 4.4.

A. Who Applies under the 1971 and 1978 Acts?

2.2 During the period of our domestic court survey, all 209 applications for financial assistance under the 1978 Act were made by wives.[4] 88% of these cases involved children. 110 financial orders were made,[5] 105 of which were in favour of wives with children. The progress of the financial applications is set out in Table 1 in the Appendix. An order for legal custody was made in 106 of the 107 applications involving children which were completed during our survey. These cases are considered in more detail later.[6] It is not possible to judge precisely how representative are our survey's results. One indication suggests that an unusually high proportion of spouses with children may have been involved. During our survey the number of custody and access orders, as a proportion of all financial orders, was 94.5%.[7] For the whole of 1984 the proportion in these courts was 86%, whereas, nationally, the

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4 156 applications were made under section 2, alleging, for example, failure to provide reasonable maintenance for the applicant or a child of the family. The remaining 53 (25%) applications were, for consent orders, under section 6, in respect of payments which had been agreed between the parties. This contrasts with the national proportion of applications by consent (38%): Home Office Statistical Bulletin 24/85, Table 2.

5 48, or 44%, of which were consent orders. 57% of applications under section 2 were withdrawn or adjourned and 3% were refused. Solicitors interviewed offered three reasons for the rate of withdrawal: reconciliation, withdrawal in favour of divorce proceedings and agreement resulting in application for a consent order. Withdrawal (not including adjournments) accounted for 54% of the total number of applications made under section 2 in 1984: Home Office Statistical Bulletin 24/85, Table 2.

6 See para. 2.8 below.

7 Excluding two custody/access orders which were made in cases where no financial order was made.

proportion was 66%.[8] The lower figures for 1984 may reflect either a higher proportion of childless spouses or a lesser propensity to make custody or access orders in other courts.

2.3 Of the 136 applications to the domestic courts for custody and access under the 1971 Act, we only have details in respect of the 89 cases which were completed during the survey.[9] These cases, 63% of which involved legitimate children, comprised 74 custody and 15 access applications. The applicants and the order they sought are set out overleaf in Table 3. The results are set out in more detail in Table 4 in the Appendix. Nearly 80% of custody applications were by mothers. However all of the access applications were by fathers of illegitimate children. Indeed 60% of fathers' applications concerned illegitimate children, compared with 26% of mothers'.

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8 Respectively, a further 20 and 242, custody/access orders were made in cases where no financial order was made: Home Office Statistical Bulletin 24/85, Table 2.

9 Although we do know that 83 (61%) of the total number of applications were by mothers and that 93 (68%) related to legitimate children. 63% of all applications resulted in an order, which compares with a proportion of 69% for England and Wales in 1984: Home Office Statistical Bulletin 24/85, Table 2. The latter figure does not take into account adjournments. The success rate of applications during our survey period is set out in Table 2. An appreciably higher percentage of applications were withdrawn or adjourned in respect of legitimate children than in respect of illegitmate (40% as compared with 23%): it may be that reconciliation and withdrawal in favour of divorce proceedings operates in these cases, see n. 5.

Table 3 Identity of Applicant and Status of Children in Applications under the 1971 Act.

Applicant and Order Sought	Status of Children Subject to Orders		
	Legitimate	Illegitimate	Total[10]
Father - Custody	12	3	15
Father - Access	0	15	15
Mother - Custody	43	15	58
Mother - Access	0	0	0
Total:	55	33	88

2.4 The survey of county court proceedings under the 1971 Act found that 74% of the 68 applications which led to an order were made by mothers. The applications led to 54 custody orders, 13 access orders and one care committal. Our information is less detailed in this survey but several of the results are similar to those found in the domestic courts. Many more mothers' than fathers' applications led to their being awarded custody.[11] On the other hand, eight of the applications which resulted in an order simply for access were by fathers and at least six of these

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10 Each case may have involved more than one child. In one further case (legitimate child) a father applied for custody to be awarded to the mother and was himself granted access. Fathers made 7 cross-applications, 5 for access (4 of which to an illegitimate child) and 2 for custody (1 of an illegitimate child). Mothers made 4 cross-applications, all in respect of legitimate children, 3 for custody.

11 The survey returns did not specify what an application was for in a given case. 43 of the 52 applications by mothers resulted in a custody order in the applicant's favour, as opposed to 5 of the 16 applications by fathers. In three cases mothers made applications in which custody was awarded to the father, and in three fathers' applications mothers were awarded custody. The most likely explanation for this result is that these cases were contested. The number of contests was not collected in our survey.

concerned illegitimate children.[12] In contrast to the domestic court survey, the overall majority (81%) of applications concerned illegitimate children and this may well reflect the areas in which the survey was conducted.[13]

2.5 To summarise, therefore, all the applications under the 1978 Act were made by wives, mostly those with children. Fathers took the initiative in more cases under the 1971 Act, particularly in respect of illegitimate children and, in about 50% of their applications, were seeking access. Nevertheless even under that Act the majority of applicants were mothers.

B. Factors Influencing Applications Under the 1971 and 1978 Acts

2.6 A general theme which emerged from the interviews carried out with judges, magistrates and solicitors was that a considerable additional burden, particularly financial, is placed on the spouse who, on separation, cares for the children. This observation is reflected in the preponderance of cases involving children in the survey of the 1978 Act and in the high proportion of maintenance orders made in Guardianship of Minors Act cases.[14] Several solicitors added that financial orders in domestic courts are sought not only out of financial need but also to give psychological security to the applicant by formalising her position after separation. Many commented that childless couples are often able to come to some financial arrangement to tide them over until divorce without the need for earlier domestic proceedings. In other cases, an

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12 In one case the status of the children was unknown. In a further five applications by mothers the only order was for access by the father. All of these were in respect of illegitimate children.

13 See paras. 2.14 - 2.16. The status of only 59 children was recorded. Applications in respect of legitimate children were made by both mothers and fathers (5 and 6 cases respectively).

14 A maintenance order was made in 47 of the 56 cases in which a custody order was made under the 1971 Act by magistrates in respect of legitimate children.

application for financial assistance under the 1978 Act may be prompted by a feeling that it is too early in the matrimonial difficulties to commence divorce proceedings.[15]

2.7 The solicitors' interviews indicated that the first suggestion that a financial order be sought frequently comes from an external agency. Almost all the solicitors interviewed in the North East deal with a large number of clients who say that they have been advised by the D.H.S.S. to consult a solicitor with a view to obtaining maintenance from their spouses. Two North East solicitors independently estimated that at least 50% of matrimonial proceedings and up to 90% of affiliation[16] cases are brought at the prompting of the D.H.S.S. and although other solicitors did not attempt to place a figure on D.H.S.S. referrals there was general agreement that they represent a large proportion of applicants for maintenance. The Supplementary Benefits Handbook published by D.H.S.S. states that, where a husband is unwilling to meet his liability to maintain his wife, the latter is "given the option of taking her own proceedings" but "the decision ... is entirely a matter for her."[17] Within the North East, however, it emerged that attitudes and practices vary from one D.H.S.S. office to another, and at the same office over periods of time. By contrast, in the interviews conducted in the South West, the role of the D.H.S.S. in prompting proceedings was not a factor which most

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15 Many solicitors anticipated a drop in the number of matrimonial cases in the domestic court as a result of the reduction in the minimum duration of marriage before which a petition of divorce may be presented: Matrimonial and Family Proceedings Act 1984, s. 1.

16 Applications for maintenance in respect of illegitimate children under the Affiliation Proceedings Act 1957.

17 (1984), para. 13.11. In a survey in Sheffield in 1980 it was found that the D.H.S.S. in some circumstances "encourages wives to take their husbands back to court annually to recoup the annual shortfall for the state" following increase in supplementary benefit rates: Smart, The Ties that Bind (1984), p. 198.

solicitors immediately called to mind. From the point of view of the D.H.S.S., there are two distinct functions to be performed by domestic court proceedings. First, an order assists in establishing a claimant's right to separate assessment of benefit by furnishing proof that a marital separation has in fact occurred. Secondly, the drain on the public purse may be reduced by recovering maintenance from men who have the resources to maintain their families. However, there was general agreement amongst solicitors that maintenance awarded by the court is seldom sufficient to lift the recipient off state benefits altogether.

2.8 As has been noted above, in our survey of domestic courts the proportion of applications under the 1978 Act which also result in a custody order was remarkably high.[18] The solicitors interviewed reported that a custody order will invariably be sought in proceedings under the 1978 Act even if there is no realistic prospect of dispute: a custody order is 'part of the package' for the client and will be requested from the court as a matter of course.[19] Most considered that they would be failing in their duty to clients if they did not 'tie up all the loose ends' in this manner. Moreover, several solicitors added that by obtaining a custody order in the magistrates' court the passage of later divorce proceedings, particularly the children's appointment, can be facilitated. The approach of domestic courts to the award of custody is considered in Part III.

2.9 Alternatively, a mother or father of the child may seek custody or access directly under the 1971 Act. The number of cases in which an order is made to resolve a dispute seems to be small in relation

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18 See para. 2.2.

19 Nevertheless, the application forms suggested for use in the domestic court do not contain provision for custody: Magistrates' Courts (Matrimonial Proceedings) Rules 1980, Forms 1, 3 and 6.

to the total number of orders made.[20] However solicitors reported that in a larger percentage of cases - and a majority felt that it was a considerably larger percentage - there is an initial dispute, after which the intention to contest lapses so that the case proceeds to the making of an unopposed order. There clearly remains a significant proportion of cases in which there is never any likelihood of opposition to the order, so that other reasons must be sought for the bringing of proceedings.

2.10 The solicitors interviewed find that it is common for women to want a custody order on separating from their husbands. The court order is perceived as lending security to the child's residence and providing formal sanction for the family's new arrangements. Thus, if there is no necessity for, or financial value in, an application under the 1978 Act, proceedings will be brought under the Guardianship of Minors Act 1971. In some cases there will be an underlying fear of the children's removal by the other parent. Where this is not a factor, many solicitors prefer to take advantage of an acquiescence in the current state of affairs by applying for an agreed order; others advise proceedings only if the husband has seriously threatened to take the children away.

2.11 As with applications under the 1978 Act, the practices and attitudes of external agencies may have a bearing on the decision to bring proceedings. In the North Eastern interviews the requirements of local authority housing departments emerged as particularly relevant. On the one hand, local authorities are anxious to avoid wasteful allocation of housing stock. Thus, a custody order is required in an attempt to ensure that family-sized accommodation will not end up being occupied by only one person. On the other hand, and solicitors tended to regard this as a factor which looms large in the thinking of local authorities, a custody order is regarded as a form of assurance that an assertion of marital

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20 See para. 3.3. The same appears to be true under the 1978 Act from the limited amount of information available (ibid.).

breakdown is not being used as a device to 'jump the queue' and get the whole family rehoused. Thus, there is an insistence on 'proof' of separation (sometimes in the form of an order under the 1978 Act even though a custody order has already been obtained under the 1971 Act) so that the local authority does not subsequently find that the husband has moved in with his wife and children after they have been rehoused on the basis of the wife's assertion of marriage breakdown. As in the case of the D.H.S.S., practices vary from place to place and from time to time.

2.12 In contrast to the North Eastern interviews, the demands of local housing authorities were not mentioned spontaneously by any of the solicitors interviewed in the South West and, when prompted on this point, most could not recall cases where housing department policy had been a major factor. Solicitors in the South West were more inclined to attribute proceedings primarily to mothers' insecurity (about themselves and their children) and the desire for ratification of the change in circumstances. As with the supplementary benefit considerations, the low awareness of housing considerations in the South West may reflect different social and economic conditions in the two regions, but cannot be taken as evidence of different attitudes on the part of housing authorities.

2.13 Another factor which was commonly mentioned in the South West but which only rarely emerged as a relevant consideration in the North East was the wish to embody an agreement for child maintenance in an order for the sake of a claim to tax relief. It seems that an application under the 1971 Act is still seen as the most obvious procedure to use in the tax relief cases, notwithstanding the consent order provisions of section 6 of the 1978 Act which do not require the case to be 'dressed up' as a custody application in which maintenance hangs on the coat tails of the custody order. Proceedings will also be taken under the 1971 Act if, as solicitors asserted is often the case, maintenance is sought only for the child. Indeed, there was some evidence in the domestic court survey of proceedings under the 1978 Act being withdrawn in favour of proceedings under the 1971 Act when an agreement is reached that maintenance should be paid only for the child.

2.14 As is noted above, a large proportion of applications under the 1971 Act seem to involve illegitimate children. Where custody or access is sought by the father of an illegitimate child, an order will theoretically be necessary to compensate for his lack of parental rights.[21] In the case of illegitimate children whose parents have been cohabiting, some solicitors thought that the parents are much more likely than married couples to sever all contact when the relationship ends. The more common view, however, was that cohabitees exhibit much the same range of behaviour in relation to their children as separated and divorced couples, although unmarried fathers are often aware of and worried by their lack of parental rights. Several judges and magistrates specifically noted an increase in fathers' claims made after cohabitation has ceased.

2.15 There has been a large increase in the number of custody and access orders made in county courts under the 1971 Act. In 1976 there were only 194 orders made, including those for periodical payments and concerning guardianship.[22] In 1985 the number of custody and access orders rose to 2,336. Applications are concentrated in urban areas and, most heavily, in London. Such applications may be linked not only to levels of cohabitation but also to applications for non-molestation and ouster orders made since the introduction of the Domestic Violence and Matrimonial Proceedings Act 1976. Several judges explained that custody or access applications may be made with the courts' encouragement to attempt to get to the root of the problem which led to an emergency application under the 1976 Act.

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21 The parental rights and duties in respect of an illegitimate child vest in the mother: Children Act 1975, s. 85(7).

22 Judicial Statistics Annual Report 1976 (1977) Cmnd. 6875, Table C.9 (x).

C. Regional Differences in the Choice of Court[23]

2.16 Use of domestic courts varies considerably across the country with the highest number of applications concentrated in the North and North Midlands, both in terms of absolute numbers and per head of the population.[24] The respective use of the 1971 and 1978 Acts for custody and access applications is broadly similar across the country, although the 1984 figure of 13,120 applictions under the 1971 Act was nearly 3,000 more than the total made under the 1978 Act.[25] Amongst the county courts the concentration of the relatively small amount of business is in the South East.[26] Nearly 60% of custody and access applications to county courts under the 1971 Act were recorded in the South Eastern Circuit. The largest returns were recorded in the London boroughs, particularly Lambeth, in which approaching 500, or 20% of the total number of county court custody and access orders, were made.

2.17 In discussing the choice between the magistrates' and county courts in relation to proceedings under the 1971 Act the immediate reaction of almost all the North Eastern solicitors was to refer to the difficulties in obtaining legal aid to go to the county court. Many referred to the relative ease, in terms of time and work involved, with which Assistance By Way of Representation (ABWOR) can be obtained for magistrates' courts proceedings. Other factors mentioned in favour of magistrates' courts were speed, familiarity, convenience (since solicitors will often have other business in the same court), proximity, and a desire

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23 Practice in respect of the overlapping jurisdictions in family proceedings is being studied currently by the University of Bristol Socio-Legal Centre for Family Studies.

24 Home Office Statistical Bulletin 24/85, Tables 6 and 7.

25 Ibid., Table 6.

26 Figures supplied by the Lord Chancellor's Department.

to keep control of the case rather than pass it on to counsel. On the other hand, several solicitors preferred to use the county court wherever possible: they referred to the lack of consulting space or interview rooms in magistrates' courts, the absence in some courts of an appointments system and the general unpleasantness of the atmosphere and physical surroundings in the public areas of some domestic court buildings. The majority of solicitors referred to the greater chance that a county court judge would be prepared to go against the recommendation in a welfare report or make some other 'courageous' decision. However in the North East these factors may have little direct impact, given the influence of legal aid considerations. Solicitors in the South West held a broadly similar range of opinions, although restrictions on legal aid tended not to come to the fore.

PART III

WHY CUSTODY ORDERS ARE MADE

3.1 In this Part we take a closer look at the proportion of cases before the domestic and divorce courts which are contested on custody to a final hearing.[1] Secondly, we report on the attitudes of the judges and magistrates interviewed towards making custody orders in the substantial percentage of cases in which the award of custody is unopposed. Finally, we examine the approach of the divorce court to cases in which the domestic court has previously made an order as to custody.

A. The Proportion of Contested Cases

3.2 Previous studies of divorce proceedings have indicated that only a small proportion of cases are contested to a full hearing on custody.[2] The largest survey put the figure at 6%.[3] To define what constitutes a 'contest' for these purposes presents difficulty and 6% may be an underestimate.[4] Nevertheless, taking 6% of the total number of children under 16 whose parents divorced in 1984, approximately 9,000

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1 The county court survey of cases under the 1971 Act did not provide information on contests.

2 Maidment, "A Study in Child Custody" (1976) 6 Fam. Law 196, 236 at p. 196, a study ('Keele') of 95 divorce petitions involving children filed in 1973 in a North Midlands county court; Eekelaar and Clive with Clarke and Raikes, Custody After Divorce (1977), Family Law Studies No. 1, Centre for Socio-Legal Studies, Wolfson College, Oxford, Chapter 6, a study ('Wolfson') of 652 divorces involving children in 1974, from a sample of 10 courts across the country. See also Maidment, Child Custody and Divorce (1984), Chapter 3.

3 The Wolfson study, ibid.

4 Ibid., and see Eekelaar, "Children in Divorce: Some Further Data" [1982] O.J.L.S. 63.

children would have been involved in court-resolved custody disputes.[5] Moreover, a number of potential custody contests may have been resolved in earlier proceedings under the 1971 or 1978 Acts. However the small amount of information we obtained in our domestic court survey indicates that there are few such disputes resolved at a full hearing in a magistrates' court.

3.3 The domestic court survey involved 196 cases concerning children which proceeded to a court's determination on custody or access.[6] These cases resulted in 189 custody orders and three orders simply for access; in three cases an access order was refused.[7] 106 custody orders were made under the 1978 Act, only one of which was contested on custody at the hearing. 83 custody orders were made under the 1971 Act, five of which involved custody disputes. Therefore, a total of 6 cases (3%) were contested on custody at the final hearing.

The Role of the Court in Making Custody Orders

3.4 Domestic courts are required to consider whether to make a custody order before dismissing, or making a final order on, a financial

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5 148,600 children under 16 were involved in divorce in 1984: O.P.C.S. Monitor FM2 85/1, Table 8. This figure includes annulments of marriage.

6 Including the cases where, on an application for financial relief under the 1978 Act, the court is required to decide whether to exercise its powers in respect of custody and access (section 8(1) and (2)).

7 All of which were applications by fathers for access to an illegitimate child. In one further case under the 1978 Act, although maintenance was ordered no order was made in respect of custody of or access to the children (uncontested). In a study of 108 applications for custody dealt with by magistrates in Sheffield over a three month period in 1980, only six appeared to be contested: Smart, The Ties that Bind (1984), p. 210 and Table 9.8. All of the contests were under the 1971 Act.

application under the 1978 Act.[8] It has already been noted in Part II[9] that in our survey a custody order was made on all but one of the 107 applications for financial relief which involved spouses with children and were not withdrawn or adjourned. Custody was ordered even in the two cases in which the application for financial relief was refused.[10] In the interviews, magistrates said that they expect to be asked to make a custody order in cases involving children.[11] Many commented that they would be concerned to know why a custody order was not being sought in any case where this occurred, and would generally prefer to see the case concluded by making such an order.[12]

3.5 In applications for access under section 9 of the Guardianship of Minors Act 1971 there is no obligation on the court to decide whether to make a custody order.[13] In our survey there were 15 applications by fathers (of illegitimate children) for access alone,[14] in nine of which the court,[15] perhaps of its own motion,[16] granted custody to the mother, in

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8 Section 8(1) and (2).

9 Para. 2.2.

10 In these cases, as in all the cases in our survey, an order was not made for maintenance for the children under section 11.

11 And solicitors expect to ask for custody, see para. 2.8.

12 The prescribed form for financial orders includes provision for custody and access orders: Magistrates' Courts (Matrimonial Proceedings) Rules 1980, Form 13.

13 The court may make "such order regarding ... custody of the minor ... as (it) thinks fit": in deciding any question relating to the child's upbringing it is bound to give "first and paramount consideration" to the child's welfare, which may, on the facts of the case, oblige it to make a custody order: Guardianship of Minors Act 1971, s. 1.

14 As to which, see Part VIA.

15 All the courts in our survey were prepared to grant custody on an application for access.

16 However, custody may have been orally requested at the hearing by one of the parties.

addition to access for the father. In these cases access had been uncontested. Of the other six cases, in three access alone was ordered (uncontested) and in three more no order was made (two of which were contested on access). Additionally as has been seen above,[17] in applications to the county court for domestic violence injunctions the court itself may suggest that an application is made for custody or access.

3.6 The practice of divorce courts in making custody orders must be seen in the light of their duty to be satisfied as to the children's arrangements before they may grant a decree absolute of divorce.[18] It is most common for the children's appointment to be held at the same time as the decree nisi of divorce is granted. At the end of the appointment custody and access orders are made with the declaration of satisfaction. As is discussed below,[19] in a proportion of cases a divorce court will make no custody order of its own because it sees no reason to change a previous court's order. However, even if no such order exists, a divorce court may make no order as to custody or care and control of the children, so that, effectively in law, custody will remain equally held by the parents.[20] We found, in the six courts where this information was obtained, that no order as to custody was made in 8.8% of cases involving children.[21] The results varied from nil in one court to 16.3% in another and 12.3% in the

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17 Para. 2.15.

18 As to which see the Part IV of Working Paper. For the exceptions to the requirement of satisfaction, see the Matrimonial Causes Act 1973, s. 41(1)(b)(ii) and (c).

19 Para. 3.9.

20 See Part IVB of the Working Paper.

21 From the courts at Aldershot, Altrincham, Bow, Exeter and Manchester and the Principal Registry of the Family Division, a total of 1,465 cases.

Principal Registry of the Family Division, with no obvious pattern of regional variation. Our returns are comparable with those found by previous studies.[22]

3.7 It is clear, however, that a custody order will be made in the vast majority of divorce cases. It seems that only a small proportion of these will be contested.[23] In the interviews judges thought that an order should be made unless a previous court's order is operative, or, according to some, the children are nearly 16 years old (and more commonly when over that age). The rationale for this practice seems to be tied to the expression of satisfaction in the children's arrangements and, as one judge put it, "it does no harm". Making no order, it was thought, may cause difficulty, for example, about consent to medical treatment and could itself even precipitate disputes over a child's custody in the future.

3.8 Our survey did not provide sufficient information on the cases in which no order was made for us to be able to add to the list of relevant factors set out by the earlier Wolfson study.[24] This study noted, as we found, that P.R.F.D. had a high number of such cases. From the few cases which came before our scrutiny no pattern seems to emerge. From the interviews with judges, there is some evidence of a 'hands off' approach in some courts when the parties are amicable and no order is made in preference to an order for shared care and control and/or joint

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22 Keele (6%) and Wolfson (8.8%), op. cit. n. 2, p. 199 and para. 5.11 respectively.

23 See para. 3.2 above and Part IVB.

24 Op. cit. n. 2, paras. 5.12 - 5.14. Suggested reasons for making no order included the age of the child (over 16), the lack of requests for custody by the parties, and the child's residence abroad. However in nearly half of the cases in their study no explanation could be proffered.

custody.[25] We had anticipated that 'no order' cases might be particularly prevalent in respect of older childen because of their greater ability to determine their own residence. However the highest incidence was found in respect of children under 5.

C. The Relationship Between Divorce Courts and Domestic Courts

3.9 Previous studies have indicated that a magistrates' court may previously have made a custody order in around a third of divorce cases involving children.[26] The Wolfson study found that the divorce court made a new order in 18% of cases where there was a pre-existing magistrates' order but the order only differed from the magistrates' in 2% of cases and, then, this was to "make adjustments in the light of later developments".[27]

3.10 As will be seen below, there is a willingness on the part of some divorce courts to change a magistrates' order to joint custody in appropriate cases.[28] Nevertheless, it is clear that in many courts a pre-existing custody order will survive divorce proceedings. The majority of judges interviewed saw no reason to make a new order in such cases. From the records of seven courts, 247 or 15% of children were not made subject to a divorce court's order, leaving a previous custody order in

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25 See paras. 5.33-5.37 below.

26 Keele and Wolfson, op. cit. n. 2, p. 197 and para. 5.15 respectively.

27 Ibid., para. 5.19.

28 Para. 5.7.

place.[29] The range of returns was from 1.3% (Aldershot) and 2.3% (Exeter) to 20.6% (Manchester), 23% (Durham) and 26.9% (Middlesbrough). The regional variation in practice seems to reflect both the greater use of the magistrates' jurisdiction in the North and differences in the willingness of the court to intervene.

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29 The courts at Aldershot, Altrincham, Bow, Durham, Exeter, Manchester and Middlesbrough: a total of 1612 cases. The orders had been made mainly in magistrates' courts, including several in care proceedings. Some orders had been made in previous divorce court proceedings and, thus, related to children who were not the children of both parties to the marriage in question. Others had been made in county courts (under the 1971 Act), wardship and judicial separation.

PART IV

THE AWARD OF CUSTODY

4.1 In this Part we examine the available statistics on the award of custody between parents and spouses, starting with orders made in domestic courts. As will be seen, some of the findings in the domestic court survey are similar to those of previous divorce court studies. Since those studies the number of joint custody orders made on divorce has considerably increased, although joint custody remains the minority order in most courts. Information concerning the award of custody by divorce courts is set out in Section B of this Part. Joint custody and the magistrates' similar order for the retention of parental rights are considered in more detail in Part V.

A. Domestic courts

4.2 In the domestic court survey all of the 106 legal custody orders made under the 1978 Act were in favour of the wife. Under the 1971 Act fathers were granted custody in 12 of the 83 cases in which a legal custody order was made.[1] Overall, therefore, fathers were awarded legal custody in 6% of the domestic court survey cases.

4.3 Studies have found a higher proportion of male-custody in the divorce courts[2] and three factors may have influenced our domestic court result. First, in our survey the use of the 1978 Act was monopolised by

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1 That is, 14%. Similarly in the county court survey only 8 out of 54 custody orders were made in favour of fathers (15%). Of the 77 magistrates' custody orders made in the Sheffield survey in 1980 13% were in favour of men: Smart, The Ties that Bind (1984) Table 9.8.

2 See Section B of this Part.

wives looking after children.[3] Secondly, the North East may be an area in which relatively few fathers seek to take on child-rearing responsibility.[4] Thirdly, the ages of the children who took part in our survey were lower than are found, on average, in divorce,[5] and as is suggested below,[6] it seems to be more common for fathers to be granted custody of older children. As Table 5 indicates, nearly half of the children in the domestic court survey were under five and, under the 1971 Act, under-fives formed 84% of the total number of illegitimate children. Even excluding illegitimate children, under-fives formed 43% of the children in our survey.

(1) Contested Cases

4.4 In the six contested hearings the mother was granted legal custody.[7] All of the children were aged under seven and eight of the nine children concerned were girls.[8] In two cases (girls aged six and four; girl aged three) the order effected a change in the child's residence (and a supervision order was made). In relation to the girl aged three, the case return did not supply information on how long she had been living with her father (the 'status quo') but in the case of the two girls, the children had been with their father or their paternal grandparents since their parents'

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3 Paras. 2.2 - 2.5 above.

4 Para. 1.8 above.

5 In 1984 the largest number of children involved in divorce were in the 5-10 age group (38%), see O.P.C.S. Monitor FM2 85/1, Table 8.

6 Para. 4.24.

7 In the 1978 Act case the children were girls, aged 4, 3 and 1. In the five Guardianship cases they were all legitimate girls aged a) 6 and 4, b) 3, c) 2 and d) 1. The fifth case concerned an illegitimate boy aged 1.

8 The proportion of younger children involved in our survey is set out in Table 5.

separation five months previously. A welfare report was available in each of the contested cases except the one under the 1978 Act, which did not result in a change in the child's residence.

4.5 The number of contested cases in our survey is clearly too small to draw any conclusions from the results; however, comparison may be made with the 39 contested cases found in the largest previous divorce court study ('the Wolfson study').[9] First, in that study the majority of contests resulted in wives being granted custody and, where the husband was awarded custody, it was not in respect of very young children. Only six of the 39 contested cases resulted in an order providing for the children to live with the husband.[10] The cases in which the children continued to live with the husband despite the wife's claim for custody involved, out of a total of twelve, ten children aged over four, the majority of whom were aged 5-11; and boys and girls were equally represented.[11] Secondly, as in our study, in only two cases did the court itself order a change in the child's residence, in each case in favour of the wife.[12] The study concluded that they detected "certain judicial caution about allowing husbands to look after children....".[13] Finally, in contrast to our survey, a welfare report was ordered in a rather lower proportion of cases which were contested on custody (or access), 53%; of the two

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9 Op. cit. Part III n. 2.

10 Ibid., para. 6.4, two of which were joint custody orders with care and control to the husband. However in four more cases the children were divided between their parents and in seven no order as to custody was made.

11 Ibid., para. 6.5.

12 Ibid.

13 Ibid.

cases involving change in the children's residence in the Wolfson study there was no report in one and in the other the court went against the officer's recommendation.[14]

4.6 The magistrates interviewed in our own study were asked what factors affect the outcome of contested custody cases. They stressed the need to provide the child with a secure and settled atmosphere: they would be looking for stability in the home. They would compare the child's relationship with each claimant; the atmosphere in each home; the time which each claimant has available to care for the child; the 'social setting' of each home, both in general terms (the standard of accommodation and so on) and in terms of the background support which each claimant might be expected to receive, for example, from grandparents and other relatives. Reference was made to the dependence of many fathers, possibly for years ahead, on arrangements reached with family, friends or neighbours; arrangements which often in practice, it was suggested, can be very fragile.

4.7 The age of the child will generally be a crucial factor,[15] not only as regards the level of care required by a younger child, but also as regards older children if there was a question of a move which would disrupt schooling or other associations. The character of, and the child's relationship with, any other persons involved, such as a parent's new partner, would also be important. The known wishes of the child would also be relevant, but the court would be mainly concerned with each parent's stability and sense of responsibility, looking for a caring parent prepared to make sacrifices in order to have the child.

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14 Ibid., paras. 6.3 and 6.5. In our survey, including contested access, a welfare report was ordered in 66.6% of cases; see para. 6.13, below, for access.

15 See para. 4.2 above.

4.8 Asked directly which factors tend to be decisive, half the magistrates were reluctant to attempt an answer, stressing the need to approach each individual case on its merits. The most common response of the remaining magistrates was to refer to the quality of care which the child might expect from each claimant, and the child's prospects of a stable background. Two magistrates (interviewed together) expressed their answer in terms of the child's bonding with each parent and said that they ask themselves "With whom will the child be happiest?", commenting that a clear answer to this question can sometimes override issues of parental competence to a certain extent.

4.9 When faced with a father's request for custody, three magistrates said that they would want to be sure that there is something in him to compensate for his not being the mother. Two of these took the view that they start by expecting to give custody to the mother. However, these and most other magistrates had no difficulty in recalling cases where the father was 'excellent' and undoubtedly the proper person to have custody. This is most likely to be established where the court's sanction is sought for arrangements under which the father already has actual custody and where the children have settled well in his care. Most solicitors considered that a former preference amongst the courts for mother-custody had yielded ground considerably in favour of maintaining the status quo. Almost half the solicitors felt that a father who shows competence in caring for the children and who has gone to some lengths to organise good arrangements now stands a much better chance of obtaining a custody order than would have been the case only a few years ago. Similarly, the Wolfson study itself found that, apart from two cases, "the principle in favour of the status quo prevailed even when contested

by the wife".[16] Nevertheless, in our domestic court survey no father succeeded in a contested custody hearing.

(2) Uncontested Cases

4.10 The award of custody was uncontested in 183 cases, which represent 97% of the total number of custody orders made. In 12 cases, all under the 1971 Act, fathers were awarded custody, all of which were unopposed by mothers, at least by the final hearing, and none involved a change in the child's residence.[17] Nine of these custody orders concerned legitimate children.[18] Of the cases in which custody was granted to the father, 13 (59%) of the 22 children involved were boys; 16 (72.5%) of the children had reached school age, and two more soon would do so. In three of these cases no child under ten was involved. Of the nine cases involving children under ten, five cases involved a single child, while three cases concerned families where at least one sibling was over the age of ten. These findings contrast with the contested cases in which mothers were awarded custody, which involved younger children and a higher proportion of girls.

4.11 The prevalence of custody orders in favour of women has been demonstrated by previous divorce court studies and is considered in more detail in Section B of this Part and in Part V. However, as for contested

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16 Op. cit. Part III n. 2, para. 6.5. However, in the Sheffield study 55% of the magistrates interviewed thought that it was more natural or better for children to be brought up by their mothers. The remainder referred to the impracticability of fathers caring for children and being employed. It was concluded that "the courts are not giving priority to women but to motherhood": Smart, The Ties that Bind (1984), p. 213.

17 In one uncontested case in which custody was granted to the mother the child's residence was transferred from the father.

18 In contrast to the prevalence of access applications concerning illegitimate children, see para. 2.3.

cases, one similarity which is apparent between our findings and those of the Wolfson study is the lack of change of the children's residence at the time of the custody order. In only one case did the court's order in an uncontested case involve the transfer of the child (in this instance from father to mother). This case did not involve a welfare report. The Wolfson study found that such a transfer occurred in only two of 607 uncontested cases.[19] Both of these involved the children moving to the wife and in neither was a report ordered. Our findings seem to confirm the experiences of the solicitors interviewed that in the vast majority of cases mothers get custody by agreement and that custody orders in favour of fathers are unopposed, at least by the final hearing.

4.12 A variety of not unrelated reasons were suggested by solicitors to account for the lack of claims to custody by fathers. It was said that many fathers, especially those who have not been much involved with the care of the children in the past, simply do not consider claiming custody, regarding it as a mother's job to look after children. Some of these fathers give solicitors the impression of being 'not really bothered' about the children. Others appear to expect that they would fail if they claimed custody and are resigned in this belief. Some feel that they would not be able to cope with custody of the children, not simply because of work commitments, but also because the pattern of daily life before the marital breakdown has left them ill-equipped to do so. Several solicitors thought that it is not infrequent, where fathers do gain custody, for the children to be subsequently transferred to the mother's care by consent[20] A small number of solicitors felt that they had detected an increase in the number of fathers' claims, perhaps due to high levels of unemployment which have made it possible for more fathers to offer full time care.

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19 Op. cit. Part III n. 2, para. 5.4

20 The small number of variation cases yielded by the survey offers no case where such a transfer was brought before the court.

4.13 Most of the solicitors referred to 'knee-jerk' cases where a determination to fight for custody is a father's first reaction when faced with the loss of wife, children and home. Several solicitors were of the opinion that disputes over custody are more likely to occur in the magistrates' court than in the divorce court because, by the divorce stage, the dust has begun to settle, a process of healing has set in, and the parties, particularly fathers, are beginning to be able to see a future for themselves independent of the rest of the family. However, as has been seen above,[21] in our survey custody was seldom contested in domestic courts. Some solicitors felt that for many fathers a decision to contest custody is more a part of the parents' private battle than the result of real concern for the children. Solicitors felt that in some cases, generally involving professional and middle-class men (teachers and the like), the decision to contest is a face-saving exercise on the part of fathers. Such fathers were not unlikely to suggest splitting the children between their parents.

4.14 A small number of solicitors referred to cases in which fathers say that they want to fight for custody (even where their claim is clearly hopeless) to ensure that the children realise as they grow older that they were not simply abandoned by their father - that he did care and did 'put up a fight' for them. However, a considerably larger number of solicitors considered this factor to be of much more significance in the case of mothers seeking to regain children whom they had left behind on leaving their husbands. Such mothers, even when faced with a father who is coping well and who has the 'status quo' argument on his side, will often insist on fighting to the end. On the other hand, one reason (described as 'not uncommon') for a mother's failure to seek custody is her new partner's objection to having the children in their household. Otherwise, the most likely cause was said to be the mother's serious inadequacy, as a result of which she has virtually given up trying to be a mother.

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21 Para. 3.3.

4.15 A large majority of solicitors distinguished between fathers' claims prompted by considerations such as those outlined above and cases (which solicitors tended to describe as 'genuine' cases) in which fathers sincerely believe that the children's interests will not be best served by remaining with their mother. Occasionally, too, a father who is concerned about the welfare of his children will make a claim for custody not for its own sake, but as a means of involving a third party - the person responsible for preparing the welfare report - and obtaining information and reassurance where the mother refuses to keep him informed as to the children's well-being. Most solicitors felt that a significant minority of fathers believe at the time of separation that it is the right thing for the children's sake that the father should have custody, and that those who insist on contesting a hearing usually have some very specific complaint or cause for concern. For example, it may be that the wife has moved in with her lesbian lover, or is in unsatisfactory accommodation, or leaves the children unattended for long periods or is on the point of a nervous breakdown or has other severe health problems.

4.16 In those cases where an intention to contest custody lapses, the prospect of almost certain failure was universally identified as the most significant factor. In 'knee-jerk' cases, this might be coupled with an abatement of antagonism towards the mother and a realisation that there is a way of life open to the father without his children. Sometimes too, an improved attitude towards access on the part of the mother can take the heat out of the situation. A father's acceptance of his position as hopeless may occur on production of an adverse welfare report and a solicitor's advice as to the difficulty of persuading a court (particularly a magistrates' court) to go against a report's recommendations. More often, however, solicitors thought that the intention to contest custody is abandoned at an earlier stage, though it may still be due to the involvement of the welfare officer, whose inquiries may lead a father to reassess his position and may bring home to him the impracticality of assuming responsibility for the children's care. Most solicitors indicated that they advise clients against pursuing claims for custody which have little chance of success, because of the danger of jeopardising the prospects of an agreement for generous access. Generally, fathers can

be talked out of continuing the fight in hopeless cases, albeit perhaps only at a relatively late stage. Most solicitors are anxious to ensure that fathers are under no illusions about their prospects of success. Indeed, several wondered if perhaps solicitors tend to be too discouraging.

4.17 The reasons given by solicitors in the South West for contesting custody and for withdrawing from a contest corresponded with those given in the North East. Solicitors' perceptions may be compared with the views expressed by magistrates, who confirmed that the majority of requests for custody orders are for agreed or uncontested orders in favour of mothers and felt that this in turn results from a feeling that the mother is the natural person to care for children, mainly, but not exclusively, because of the expectation that fathers will go out to work. The prevailing view among the magistrates interviewed was that fathers who really want custody will apply for it and are generally well-informed as to their right to do so. Three magistrates referred to a recent increase in the numbers of claims by - and orders in favour of - fathers, and suggested that this may be attributable to the removal (by unemployment) of the main obstacle to the assumption of full-time care by fathers. Most magistrates specifically mentioned their dislike of cases where the father is applying for custody expecting simply to turn the child's care over to his parents or other relatives.

(3) Welfare Reports[22]

4.18 Overall, welfare reports were ordered in 27% of cases under the 1971 Act and 3% of those proceeding under the 1978 Act, that is in 14% of the total number of cases. It is noticeable that a report was available in 15 (45%) of the 33 cases involving illegitimate children, and

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22 The statistics in the following paragraph should be treated with some caution because the court returns disclosed a case as 'contested' only when it was contested at the final hearing. Since a common reason for ordering a welfare report is the anticipation of a contest, some welfare reports may be attributable to arrangements for a contested case which did not materialise.

only 10 (18%) of the 56 cases involving legitimate children under the 1971 Act, or, if the 1978 Act cases are included, in 13 cases out of 162 (8%).[23] A similarly striking disparity is apparent when the sex of the custodial parent is taken as the distinguishing factor. Fathers were awarded legal custody in 12 cases and in seven of these a welfare report was available, including all those which involved an illegitimate child. Where legal custody was awarded to the mother, welfare reports were available in 18 cases, representing 23% of cases under the 1971 Act. Taken together with the 1978 Act cases, welfare reports were available in 11.5% of cases where the mother had custody.

4.19 In contrast, although a higher rate of adjournment was found by the Wolfson study when the children were living with the husband, they found that welfare reports in uncontested cases were as frequent when the children were living with the wife as the husband.[24] Welfare reports were ordered in 8.2% of cases which were uncontested on custody or access.[25]

B. Divorce Courts

4.20 The great majority of orders covered in this section were made at 'children's appointments'.[26] Most commonly these involve an

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23 The high number of reports in respect of illegitimate children partly reflects the number of contested access hearings: see para. 6.13.

24 Op. cit. Part III n. 2, para. 4.7.

25 Ibid., para. 4.6.

26 Children's appointments are discussed in Part IV of the Working Paper. We include all custody orders made under section 42 of the Matrimonial Causes Act 1973. In addition to divorce, the figures cover a relatively small number of proceedings for nullity and judicial separation. Other orders will have been made subsequent to the court's declaration of satisfaction, perhaps in a contested case or on an application to vary a custody order made at an earlier appointment, the numbers of which are not differentiated in the 1985 returns.

informal and uncontested hearing at which custody of the children is granted to one spouse,[27] with provision for access by the other. However, over the past decade there has been a sizeable and, it seems,[28] a continuing increase in the number of orders granting the parents joint custody of their children. Several factors which have contributed to this trend are considered in Part IV of the Working Paper, where the legal effect and the merits of joint custody are discussed.

4.21 According to the statistical returns of 174 divorce registries, 82,059 custody orders were made in 1985. 77.4% of these orders granted sole custody to the wife, 9.2% to the husband and 12.9% granted joint custody.[29] National statistics do not exist for previous years. However, an impression of past practice may be derived from past research, as set out in Table 6 in the Appendix. It should be noted that, for the purposes of comparison, instances in which divorce courts made no custody order have been subtracted from the results of earlier research. This is because the national returns for 1985 do not record such cases.[30]

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27 The spouse will usually be a parent of the child. In six of the courts which took part in our own survey we found that 8.7% of the 1044 children involved were not offspring of the marriage.

28 In the first half of 1986 the number of joint custody orders as a percentage of the total number of custody orders, increased by over 2% on the 1985 results, with several courts recording over 50% joint custody.

29 The Principal Registry of the Family Division (P.R.F.D.), based at Somerset House in London, is not included in these returns and is considered separately below, see para. 5.30. An estimated 5,000 custody orders were made by P.R.F.D. in 1985, roughly 7% of the total. To include an estimate of their returns, extrapolated from our own survey, would increase the national proportion of joint custody orders to 13.8%.

30 See paras. 3.6 - 3.10 for a discussion of the cases in which divorce courts make no order as to custody.

4.22 Table 6, therefore, records the number of wife, husband, joint and 'other' orders, as a proportion of all custody orders made by the divorce courts in each study.[31] It suggests that there has been more than a threefold increase in joint custody orders made on divorce since the Wolfson study in 1974. The research of Davis, Murch and MacLeod ('the Bristol study') in 1980 seems to reflect an earlier time in the evolution of joint orders.[32] Results in 1985 from the courts which participated in the earlier studies (Bristol (2) and Wolfson (2)) indicate that in absolute terms the increase in joint custody has been largely at the expense of wife orders. However, generally,[33] husband orders formed a small proportion of the total number of custody orders at the time of those earlier studies and seem to have been reduced proportionately more in the intervening years.

4.23 The statistics compiled for us by ten divorce county courts provide a sample of the children in respect of whom the three different custody orders are made: orders granting custody to the wife, to the husband and joint custody orders. The results are set out in Table 7, over.[34] These courts, necessarily, are not representative of the national

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31 An order may relate to more than one child. Courts are instructed that 'other' orders are intended to cover awards of custody to third parties, for example relatives. 'Others' presumably also includes custody orders made in favour of one of the child's parents if he or she is not a party to the marriage being dissolved. Previous studies, unlike the national returns, were able to record orders where children were split or divided between their parents. For comparison with 1985 such cases in the earlier studies have been treated as orders in favour of both the husband and wife (see Table 6 n. 7).

32 An increase was recognised in Practice Direction 18 February 1980: [1980] 1 W.L.R. 301.

33 With the apparent exception of the court in the Keele study. However in 1985 the same court recorded husband orders at the high proportion of 15.3% and joint custody at only 4.5%.

34 Excluding orders in favour of third parties. As with the national statistics, the returns only cover orders made by the divorce courts.

picture; they were specifically selected to provide a range of high and low proportions of joint custody. In this survey joint custody orders formed 21% of all custody orders. Their results are examined in more detail in Part V.

Table 7 Children Subject to Custody Orders by Age and Sex. (Percentages) n. = 2927

Proportion of children in each category subject to wife, husband and joint orders.

Custody Order	Boys	Girls	Age of Children[35] 0-5	6-10	11-15	16+
Wife Orders	71	73	80	72	67	61
Husband Orders	8	6	3	6	12	16
Joint Custody	21	21	16	23	21	22
Total Number (=100%)	1497	1430	760	778	788	173

4.24 From Table 7 several propositions may be made:-

1) At all age groups mothers were more likely to be granted sole custody than fathers (on average at a ratio of 10:1).

2) Mothers were marginally less likely to receive sole custody of boys than girls.

3) Fathers were relatively more likely to receive sole custody of boys than girls.

4) The older the child the more likely the father was to be granted sole custody.

35 The ages of 428 children were not available.

5) Joint custody was awarded equally in respect of boys and girls.

6) Joint custody was less likely of children under 6 but was roughly constant at higher ages.

4.25 The evidence from our survey may therefore seem to support the existence of two common beliefs about the award of child custody: that younger children, particularly girls, are better raised by their mothers after divorce and that fathers are more appropriate caretakers of boys (particularly when they are older) than of girls.

4.26 In the interviews we carried out the judges' response to the prevalence of wife orders varied. Half considered that the statistics merely reflected 'the normal way of things', with child rearing duties being impracticable for many fathers. The other half thought that the figures reflected a desirable preference for mothers. Several expressed the view that mothers are better at caring for children and that the father's role was best fulfilled through employment. Another explained that he also had sympathy for a mother's claims, having given up a substantial part of her life for the family.

4.27 A fuller picture of children's residence under divorce courts' orders can be obtained by adding details of the award of care and control under joint custody to our information about custody orders. Care and control orders are not recorded in the national statistics, but the results of our ten court survey give an impression of court practice and are set out in Part V.

PART V

ORDERS PROMOTING JOINT RESPONSIBILITY FOR CHILDREN

5.1 As is explained in the Working Paper,[1] joint custody is usually understood to mean that legal responsibility for taking the most important decisions about the children's upbringing after divorce is shared, although only one parent has day-to-day care and control and the other has access. In this Part we look at several aspects of joint orders in practice. First, in the light of the considerable regional variation in the proportion of joint orders, we discuss factors which seem to influence their incidence. Secondly, since each joint order is usually combined with an order specifying who is to have care and control of the child, we analyse the award of care and control in our ten court survey.[2] Finally, we turn to consider exercise of the power of courts under the 1971 and 1978 Acts to order that the parent or spouse who is not living with the child retains parental rights and duties jointly with the person caring for the child.

A. Joint Custody

(1) Regional Variation in Joint Custody Orders

5.2 Table 6, described in Part IV, suggests that the number of joint custody orders has increased from around 5.2% of all custody orders in 1974 to 12.9% in 1985. However, the overall increase masks considerable regional variation. Figure F.1 in the Appendix shows the proportion of

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1 Paras. 2.34 - 2.50 and 4.35 - 4.43.

2 Thanks are due to Richard Hawkings and Katharine Matheson of the Law Commission, for their assistance with the statistics in this Part, and Mr. John Haskey of O.P.C.S., for his helpful advice on an earlier draft.

joint custody orders made in each circuit.[3] As can be seen, the percentage of joint custody orders made in the Western and South Eastern Circuits is over three times greater than that in the North and North Eastern Circuits, with the other circuits giving middling returns.

5.3 Map M.2 enlarges upon these findings by plotting the returns geographically according to the groups of courts within each circuit. By breaking the circuits into regional groups the map reveals that the incidence of joint custody orders gradually increases from North to South, becoming most common in the Kingston-upon-Thames group of the South Eastern Circuit but remaining steadily strong throughout the whole of the South of the country. Comparison with the proportion of wife orders both graphically and geographically (Figure F.2 and Map M.3) shows that wife orders seem to decline from North to South in similar proportion to the rise of joint custody. Meanwhile husband orders (Figure F.3 and Map M.4) remain remarkably constant, varying within a range of only 2.4% between circuits.[4]

5.4 Despite the regional pattern, there is considerable variation within most of the groups, with a range of 20% in the ordering of joint custody common. Even amongst the Northern courts several high joint custody returns are recorded.[5] Further, the influence of a single court is

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3 There are six circuits, split into groups, which are plotted in Map M.1. The volume of custody orders made in each circuit as a proportion of the total in England and Wales in 1985 was: South Eastern (SE) 30%, Midland and Oxford (MO) 19%, Western (W) 15%, North Eastern (NE) 14%, Northern (N) 14% and Wales and Chester (WC) 8%.

4 In contrast, joint custody varies by 13% between the Northern and Western Circuits, and wife orders by 13.1%.

5 At, for example, Penrith (21.8%) and Hartlepool (20.4%).

responsible for bolstering the returns in some groups.[6] The Western Circuit produces three similar group returns, ranging from 18% to 19.7% joint custody. The consistency of their returns gives this circuit the highest proportion of joint custody orders. Although the Kingston-upon-Thames and Maidstone Groups produce high returns, averaging at 21.8% and 18.8% respectively, the South Eastern Circuit's average is reduced by the Inner London courts and the Chelmsford Circuit, which includes East Anglia.

5.5 The concentration of joint custody orders in Southern areas, particularly those which might be considered relatively provincial, rather than urban, is highlighted by Table 8 overleaf. Table 8, drawing on the groups with the highest rates of joint custody, lists the twenty courts with the highest and the lowest numbers of joint orders. Column 1, the highest joint custody returns, generally reflects stereotypically Southern provincial areas, mostly in the "Home Counties". The courts in Column 2 largely serve Inner London and East Anglia.[7]

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6 Cambridge increases the Chelmsford Group return by 3%, Edmonton the London Group by 4% and Oxford the Birmingham Group by 8%.

7 In 1985 there was also a large range in the returns from the courts which had been considered in the Wolfson study: from Guildford 32% joint custody to Newcastle 4%.

Table 8 Courts with the Highest and Lowest Proportion of Joint Custody Orders in the South Eastern and Western Circuits and the Birmingham Group of the Midland and Oxford Circuit.

Column 1: Highest			Column 2: Lowest		
Court	Percentage of Joint Custody Orders	Total of Custody Orders	Court	Percentage of Joint Custody Orders	Total of Custody Orders
Oxford	43	1247	Romford	4	774
Truro	42	79	Bodmin	4	143
Cambridge	40	804	Willesden	5	407
Barnstaple	38	34	Ilford	6	653
Edmonton	36	702	Lowestoft	6	245
Tunbridge Wells	36	601	Colchester	8	528
Guildford	36	477	Northampton	8	355
Aldershot and Farnham	33	424	Norwich	9	1374
Reigate	32	185	Coventry	9	1371
Maidstone	30	452	Southend-on-Sea	9	1140

5.6 Why is there regional variation in joint custody orders? [8] Some joint custody orders are made in every divorce court. Our inquiries suggest that disparity in orders reflects differences both in the courts' approaches and in the proposals put forward by spouses across the country. The regional pattern masks a consensus amongst the judges interviewed that, where possible, both parents should continue to be involved in their children's upbringing after divorce. However, from the interviews, three different approaches to joint custody were apparent: promotion of the joint option; a non-interventionist or laissez-faire attitude towards the parties' proposals as to custody; and scepticism about or discouragement of joint custody. Indeed, several of the judges commented that they felt they were working in isolation: they were not aware of the practice in other courts and, prior to their appointment, usually working as barristers, they had gained little or no experience of children's cases. The approaches of the judges will now be considered in more detail along with other factors which appeared from the interviews to be influential on the orders made.

(a) Promotion of Joint Custody

5.7 In the courts registering exceptionally high[9] numbers of joint custody orders, which are largely confined to the South of the country,

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8 One factor which may contribute to the results is a number of applications by a parent and a step-parent to vary the custody order made on the former's divorce to joint custody. However the latest figures record that only 44 step-parent adoption applications were refused because the court considered a custody order would be more appropriate: Judicial Statistics Annual Report 1983 (1984) Cmnd. 9370, Table 4.3. Moreover, although one study found that the number of applications for step-parent adoption greatly declined following the Children Act 1975, it was concluded that "step-parents deflected from adoption did not appear to find the alternative (of joint custody) acceptable": Masson, Norbury and Chatterton, Mine Yours or Ours (1983), p. 85.

9 That is, around 30% of custody orders and above.

the judges seem to endeavour to promote joint orders. Judges interviewed said that joint custody may be suggested at the children's appointment in a broad range of cases, even though it may never have been raised with the parties before and even though a previous court had awarded sole custody to one of them. These courts are typically served by one or two judges who have developed a common practice. In contrast, consistent returns are less likely in courts which see a high turnover of judges, many of whom may sit only occasionally or temporarily.

5.8 Several of the courts which make a high proportion of joint custody orders issue informative literature inviting both parents to the children's appointment and this may include an explanation of, and indicate a preference for, joint custody. Dual attendance clearly enhances the court's ability to encourage joint custody and, indeed, some courts will only suggest a joint order if both parties are present. From our study, the literature seems to serve its purpose in that in these courts there has been noticeably higher attendance by both parents, sometimes in over 50% of cases.[10] Several courts also encourage solicitors to come to the hearing (and endorse the Green Form for attendance), which may enable additional flexibility at the appointment if, for example, a parent is unsure whether to accept the suggestion of joint custody.

5.9 In the courts we visited where a high proportion of joint custody orders are made the children's appointment tended to be heard informally in chambers, with the attendance of a court welfare officer. Such facilities depend on the resources available, which vary considerably, and the degree of liaison between the judge and the officers concerned. An atmosphere may be created which is conducive to introducing the

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10 A similar finding was made in Dodds, "Children and Divorce" [1983] J.S.W.L. 228, 230.

option of joint custody. Some courts make use of a short adjournment for the parties to discuss with the welfare officer either their differences or, in some cases, the newly-raised joint option, although the presence or availability of a welfare officer did not always coincide with a high proportion of joint orders. Joint custody also may result from the work of the welfare officer in preparing a welfare report. The officer's role has become less investigative in some places, more aimed at obtaining an agreed solution.[11]

5.10 The availability and use of more formal conciliation procedures seems to have had a direct influence on joint custody rates. In some courts cases which are likely to be contested are automatically referred to conciliation appointments before a judge or a registrar. Additionally or alternatively the appointment may be before a welfare officer. Although such appointments may affect a relatively small proportion of divorce cases, joint custody seems to be a common result.[12] Families may be also referred to conciliation services independently, for example by their advisers, or over matters such as access or financial arrangements. The option of joint custody may be raised during such referrals. A joint order may be symbolic of the parties taking a positive approach to their post-divorce obligations. However, the availability of conciliation services varies across the country, as, it seems, do the attitudes towards them of the practitioners involved. In the South West, the majority of the small sample of solicitors interviewed were optimistic about conciliation and made regular use of the service. Among the North East solicitors who had experience of the local schemes, opinion was fairly evenly divided. Some warned that conciliation could be

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11 See para. 4.8(b) of the Working Paper and the warning of Ewbank J. in Re H. [1986] 1 F.L.R. 476.

12 See the Wolfson study, op. cit. Part III n. 2, para. 6.6. See also Parkinson, Conciliation in Separation and Divorce (1986), pp. 96-101, 142 and 190.

dangerous. For example, a parent, relying on the child continuing to live with him and the status quo being in his favour, could give a totally spurious consent to a conciliation attempt with the sole aim of delaying a contested custody hearing. A more common criticism was that conciliation often results in a grudging acceptance of a compromise solution which both parties resent, whereas each would have accepted a solution imposed by the court. Regional difference in attitudes was also found among the judges interviewed, while most saw benefit in the parties having access to conciliation services, those who were more cautious sat in inner city areas or the North.

5.11 The solicitors themselves may be directly influential in promoting joint custody. The majority of the admittedly small number from the South West were quite strongly in favour of joint orders. Some took the view that joint custody should always be given a try, except perhaps in extreme cases of violence, in the hope that, after the initial reaction to the divorce has worn off, the parties will work together in the interests of the children. Others mentioned that joint custody can be a good bargaining tool in helping spouses to reach out-of-court agreement on financial as well as child-related matters. It was also recognised that knowledge of certain judges' preferences influence their advice to clients. The requirement of a certificate of satisfaction being obtained prior to the decree absolute of divorce provides an incentive to tailor arrangements to such preferences. Finally, it seems that in some areas there is an increasing amount of co-operation between the parties' advisers, which may encourage seeking 'joint' solutions on divorce.

5.12 The majority of solicitors interviewed who practised in the South West asserted that there had been an increase in the amount of spontaneous interest among clients in joint custody. These solicitors commented that clients are increasingly well-informed and have often made other inquiries before consulting a solicitor, whether at a Citizen's Advice Bureau, or among divorced friends or simply in consumer advice literature. Some solicitors tended to attribute the recent increase of

interest in joint custody to increased media coverage. All the North East solicitors reported that clients rarely show any spontaneous curiosity about joint custody orders. It tends to be raised only by "well-educated/better-informed/middle-class" parents such as "university people", teachers, executives, prosperous farmers, and so on. Several judges in low joint custody areas added that joint orders are generally only sought by "middle-class" couples.

5.13 The judges who promote joint custody expressly denied that it is a "middle-class option", yet only one of the courts which recorded a high number of joint custody orders serves a predominantly "working class" area (see Table 8). One judge characterised his area as ripe for high joint custody, given the parents' "civilised" attitude to divorce and their articulated concern to do the best for their children, taking a continued interest in their development, education and careers. Similarly, he thought, the children of these parents are relatively advantaged and issues such as education (often private) remain live, requiring decisions to be made. In contrast, a judge in an inner city court thought that the joint custodial issues, education and the like, were largely of little relevance to his clientele. Courts' (and solicitors') expectations of the divorcing couples they encounter, and their perceptions of what is relevant to those couples, may well play a significant role in the development of joint custody. Similarly important are the differing views on the related question of the merits of joint custody, which are set out in Section 2 below. Social conditions in certain Southern areas, producing more amicable divorcing couples who express interest in their children, may encourage the use of joint custody, although such orders, once established, can be used, in the phrase of one judge, "across the classes".

5.14 To give an idea of the relative strength of the factors which contribute to high joint custody: even in courts which have developed a willingness to initiate joint custody wherever possible, the proposals put to the court seem to contribute substantially to the high returns. From the estimates of several judges and the records of three other courts

where joint custody is particularly high and which took part in our statistical survey, around 50% of joint orders were requested in the petition, the respondent's answer or in subsequent correspondence with the court.[13]

(b) Laissez-Faire

5.15 It seems that in a much larger proportion of courts the judges are less willing to put forward joint custody unless there is clearly a high degree of co-operation between the parties. In these courts the custodial arrangements suggested by the parties may well prevail unless some evidence of risk to the child's welfare is detected. It is here that the arrangements proposed by the parties would seem largely to determine the proportion of joint custody orders. The general regional pattern discussed in paras. 5.5-5.8 would seem to reflect greater client interest in joint custody in the South, through a combination of the parents' spontaneous inquiries and the advice received from solicitors and welfare agencies. The judges' objective of continued parental involvement after divorce is pursued by concern with access arrangements rather than joint custody.[14] Exceptionally, if the court perceives the parents to be capable of amicable communication with each other, joint custody may be raised. From the interviews it seems that the tendency to intervene in this way may, again, be more prevalent in the South.

(c) Scepticism about Joint Custody

5.16 In several courts where joint custody is below the national average the judges interviewed react with scepticism to parties' proposals for joint custody. They require to be convinced that sufficient harmony

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13 A similar result was found by the Wolfson study, op. cit. Part III n. 2, paras. 5.6 and 6.6.

14 See para. 5.22.

exists between the parents and may order an adjournment for the parties to think over their suggestion. Equally one judge said that the court may dissuade the parties from joint custody, starting from the premise that a joint order is unnecessary, may be detrimental and therefore requires justification. In the North East where joint custody is low, very few solicitors would themselves take the initiative in suggesting joint custody though most had experience of some cases in which it had been desirable for women clients to accept joint custody as a means of avoiding a contested hearing, if not as to care and control then as to the form of the order as regards custody. In such cases, the solicitors had invariably "sold" the idea to the client by explaining away the joint order as "just a matter of words".

(2) The Argument over Joint Custody

5.17 These diverse attitudes towards joint custody seems to arise from disagreement over the symbolic importance of sole and joint orders. The judges interviewed were, in general, agreed as to the legal effect of custody orders. The majority believed that sole custody does not give the custodial parent a pre-emptive right to make major decisions concerning the child's upbringing;[15] equally, a joint order did not give the non-residential parent power to interfere in the day-to-day life of the child; but neither order places the parents under a strict legal duty to consult each other over the child's future. Under a sole or a joint order the final resort in cases of dispute was to the court.

5.18 Only two of the judges interviewed thought that a parent with sole custody is in a different legal position from one with sole care and control under joint custody. One of these judges, who is disinclined to joint custody, considered that the parent with care and control but

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15 Following Dipper v. Dipper [1981] Fam. 31.

without sole custody "gives something up", some freedom of action (which was left unspecified). Another judge, who favours joint custody, felt that, despite Dipper v. Dipper,[16] a sole custody order "must have some effect". To encourage joint custody, he explains to the parents that a sole custody order vests the parental rights and duties in one of them, whereas under a joint order rights and duties are shared. However, even in the former situation he advises that the custodial parent should consult a non-custodial parent who is interested in the child on major matters. He adds that the non-residential parent may be in a stronger position under a joint custody order if the child needs medical treatment which is a "borderline emergency": joint custodial status may facilitate the authorising of action. This explanation probably encourages joint custody being accepted by parents anxious to do the best for their children, although the judge is loath to pressurise them.

5.19 Despite general agreement as to the legal effect of joint custody, during some of the interviews with judges (and in some of the leaflets prepared by the courts and welfare services) the parties to a joint order were assumed to be under a duty to consult each other over major decisions affecting the child's upbringing. As one judge put it, that is the reason for the order. Hence understanding of a joint custody order's exact legal effect may become somewhat distorted. This distortion is reinforced by the different practical consequences of the two orders; for example, some schools require proof of custodial status before issuing reports on the child's progress. Such practical considerations also weigh with some courts in deciding whether to make a joint or sole order.

5.20 The main argument over joint custody, however, concerns its symbolic effect. Amongst the judges, proponents consider that joint

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16 Ibid.

orders have the value of demonstrating to both parents and the child that the non-residential parent (usually the father) has a continuing parental role. His concern for the children is recognised. His involvement in the child's upbringing is encouraged by the 'joint' status and his sharing of responsibility may assist the residential parent by providing a wider network of support. The lower status of an 'access' parent is relatively discouraging to the party who has lost custody. Equally, in the interviews carried out with solicitors, it was universally believed that clients equate sole custody with "complete control", subject to well-known exceptions such as access and change of a child's surname. Moreover, clients are said to assume that a custody order is final and irrevocable. As one solicitor put it, the sole custodial parent is perceived as having the right to lay down conditions and make the rules for the future.

5.21 The main objection which 'sole custody courts' have to joint custody is fear that a joint order will contribute to discord. Typically, the judges referred to a risk of interference with the residential parent which could have deleterious consequences for the child; a joint order may be seen as 'giving up' some freedom of action. The child could fall between two parents if neither has clear responsibility for him. One judge stressed that in his inner-city area the best which could be achieved was to defuse violence and "to refrain from stirring up the hornet's nest". A joint order would invite further conflict and bitterness, "another stick for beating"; only in exceptional cases would a degree of co-operation exist to countervail that risk. However, no judge recalled that a noticeable number of applications were made to vary joint custody orders to sole custody, more to vary in favour of joint custody. Only one judge thought that applications for the resolution of disputed matters (for example over the child's schooling) were more than "rare", and these could arise equally following a sole or a joint custody order. Moreover, the solicitors interviewed said that, in their experience, joint custody orders did not tend to store up problems for the future except in cases where such an order had been imposed as a compromise solution against the wishes of the parent who cares for the child.

5.22 Where continued involvement of both parents is desirable the judges in 'sole custody courts' stress that a sole custody order does not give pre-emptive rights and concentrate on encouraging access. The non-custodial parent's role depends on his access and the relationship he can build with his child through such contact. His influence on the child is through liaison, not rights. The judges' argument runs that a joint custody order will not assist the practice of access; whatever the psychological effect of joint custody (and that equally may be detrimental through encouraging interference) it will not overcome the many factors which contribute to the waning of contact with the non-residential parent. Similarly it was a common view amongst solicitors that the existence of a joint order makes little impact: either the parents are able to co-operate (in which case many solicitors took the view that a joint order is unnecessary) or they are not (in which case joint custody will not work). Their most severe criticism was directed to the use of joint custody as a kind of consolation prize in order to resolve an argument over who is to care for the child.

5.23 A further reason given for doubting the benefit of a joint order in all but the most amicable of cases is that the desire for a joint custody should be genuine (that is, from the parties' own free decisions). Hence some judges were unsure about the desirability and efficacy of raising joint custody at the children's appointment, seemingly foisting it upon the parties, at a time when there is great pressure to accept. This argument weighs heavily with the courts which adopt a relatively 'laissez-faire' approach. The judges who do raise joint custody all said that the parties in practice tend to accept their suggestion.

5.24 One judge said that he is always sceptical of a father who seeks a joint order when the mother would prefer sole custody. It was common ground among solicitors in both the North East and the South West that the idea of joint custody is invariably raised by husbands who are not living with the child, rather than by custodial wives. On the whole, it was said, wives prefer to have sole custody, even in cases where they say they are quite willing to consult the father about the children's

upbringing. It was said that the idea of joint custody makes wives uncomfortable, as if it perpetuates the husband's hold over them, and that some mothers oppose joint custody out of fear of a future variation application, as if it somehow gave the father 'a foot in the door'. Thus, many solicitors were of the view that mothers are most likely to agree to joint custody only in order to prevent a full hearing in a case which they think they might lose. If there is no chance of the father taking over care of the children, joint custody will normally be opposed. However, where there has been an unusually 'civilised' divorce, wives may be willing to agree to joint custody.

5.25 Several judges commented that it is difficult to explain the effect of a joint custody order. If a non-custodial parent is concerned about a particular issue a specific undertaking could be taken. Similarly, most solicitors referred to the difficulty they experience if they are obliged to try and explain the effect of a joint custody order. They did not believe that clients were able to appreciate any distinction between custody and care and control. It was the general view that the majority of clients have only a very limited conception of parental rights and would find it difficult or impossible to grasp the full implications of a joint order. After all, as most solicitors pointed out, in the majority of cases there will not be a great deal to consult about: parents will usually share the same religious views, or lack of them, and there is generally not a great deal of choice or decision-making in matters relating to education. Thus, the solicitors themselves found it very hard to ascribe any practical significance to joint orders. Most commonly, joint custody was described as 'mere playing with words' if it is clear that the real burden and responsibility of child care is going to fall entirely on one party's shoulders. Solicitors tended to feel that such a parent has a right to a sole custody order. Thus, some considered that joint orders should be reserved for cases where parents' occupations (such as teaching) make possible a level of access almost amounting to shared care (or, perhaps, where children are split between their parents with mutual rights of access).

5.26 In conclusion, there is disagreement over the legal effect and the merits of joint custody orders. Whilst most of the judges agreed that a joint order has the same legal effect as a sole order, some of them thought that divorcing parents equated custody with care and control, which contrasts with solicitors' belief that their clients assume custody to give virtually complete control. Reservations expressed about joint custody caution some judges and solicitors against encouraging parents to accept a joint order. It seems that variation in courts' statistical returns may be attributed in part to uncertainty about the effect and merits of the range of orders available as well as to real or perceived differences amongst families and in social conditions. A need is apparent both for clarification of concepts and for research into the practical efficacy of joint custody orders in a broad range of circumstances.

(3) The Criterion Applied by the Court

5.27 The differing opinions concerning the merits of joint custody are reflected in the standards applied in assessing whether such an order should be made. Although the paramountcy of the child's welfare is the sole legal criterion for the court's decision,[17] joint custody is often assumed to be in the child's interests provided that the requisite degree of co-operation exists. The standard of a 'reasonable prospect of co-operation'[18] generally remains the touchstone. However in practice this may be construed as 'absence of overt hostility' or in the phrases of the judges: "if the parties are not spitting at each other" or "there are no daggers drawn". Some judges may seek to exhort communication between the parents where it has been lacking. Moreover, several thought that if it was in the children's interests a joint order could be made

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17 Hurst v. Hurst [1984] F.L.R. 867.

18 Jussa v. Jussa [1972] 1 W.L.R. 881.

following a custody dispute. Although the parents may not seem to be co-operative, the joint order may put some positive pressure on the custodial parent.

5.28 A less optimistic construction of the formula of co-operation is used by judges who require to be satisfied that there are no potential "bones of contention" and that there is real evidence of the parties being able to get on together for the sake of the children. One judge remarked that joint custody seemed to arise most frequently when the divorce was by consent after two years' separation. Other judges specifically added adultery cases to consensual divorces as often resulting in joint custody.

5.29 Hence the concentration of the court may fall on the parent-parent relationship when deciding on joint custody. Nevertheless, most of the judges also thought that it was important for the non-residential parent to be physically involved in the child's upbringing through access visits. There should be a real interest in and fondness for the children. Lack of access would have to be for good reason, for example, work-related absence. As one judge put it, he would not make a joint order "in name only". Although some judges may use joint custody to encourage involvement in the child's life, an order simply to give another 'a say' or as a consolation prize would only cultivate resentment.[19] However several other judges thought that, exceptionally, a joint custody order may be made to mollify a parent who is bitter having lost care of his children, provided that such an order was not contrary to the children's interests. Another thought that joint custody may be appropriate if the father was paying the children's school fees.

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19 In contrast to the dicta of Ormrod L.J. in Caffell v. Caffell [1984] F.L.R. 169, 171.

(4) The Award of Care and Control: Children's Residence under Joint Custody Orders

5.30 Although there is a high degree of regional variation in ordering of custody, is there also a difference in which parent assumes child rearing duties? The national statistics do not indicate to whom care and control is awarded under joint custody orders. However our ten court survey provides fuller information about joint custody orders made in respect of 612 children. In this survey joint custody formed 21% of custody orders. The courts were selected mainly for their similar results to those in which interviews had taken place. We aimed to obtain a large sample of joint custody orders while also using courts with both high and low returns. As can be seen from Table 9, the highest proportions of joint custody orders were found in Guildford, Exeter, P.R.F.D.,[20] Wandsworth and Aldershot. Lower proportions were recorded in the North, particularly in Manchester, and in Bow. The awarding of care and control under joint custody is set out in Table 10.

5.31 This table shows that wives received care and control five times more often than husbands. In courts in which wife orders (custody to the wife) were relatively low the proportion of joint custody orders giving care and control to the wife was high (Guildford, Exeter and P.R.F.D.). A lower proportion of care and control orders in favour of wives was found in Altrincham, Bow, in which a substantial proportion of shared care and control orders were made, and Durham, where the number of joint orders was too small to be significant. In these courts the proportion of orders giving sole custody to the wife was among the highest. This indicates that the respective claims of wives and husbands, which may seem to be treated differently in terms of custody, are balanced by the award of care and control. This conclusion is reinforced

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20 The Principal Registry has both High Court and county court jurisdiction in matrimonial matters, which are not distinguished in our returns; see also Part IV n. 29.

by Figure F.4 which presents the number of cases in which custody and care and control are granted to the wife. The aggregate return for each court produces a remarkably consistent return of wife-residence in around 89% of cases.

5.32 Wives were granted care and control of a roughly equal proportion of boys and girls. Husbands were awarded care and control of 18% of boys and 15% of girls who were subject to joint custody orders. Only 10% of these children who were under six were placed in the care and control of husbands, in contrast to 20% of the 6-10 age group. These observations about the age and sex of children under care and control orders are comparable with those made in respect of sole custody orders in para. 4.24.

(5) Shared Care and Control

5.33 Table 10 also indicates that in the vast majority of cases care and control of the child was granted to one parent. Care and control was not dealt with in only nine (or 1.6%) joint custody orders, which represents 0.3% of the number of children in our survey. In such cases care and control simply may have not been in issue, for example because the child was mainly living away from home, at school, or the parties may have been expected to share it. In four cases an order for shared care and control was made. The combined total of joint custody orders which, nominally, may have intended that the child's residence be divided between both parents was only 13. Of these 13 orders, eight were in respect of girls and ten were of children aged over 5. Over half of the orders were in respect of children aged 11-15.

5.34 The judges we spoke to were all cautious about not making any order as to care and control or ordering that it be shared. Several believed that such a joint arrangement would be positively dangerous.[21]

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21 See R. v. R. (1986) The Times, 28 May 1986.

Another wondered if he had power to make no order. Nevertheless, even in courts with low joint custody rates, most of the judges recalled having met cases with sharing arrangements. They may occur, for example, when parents continue to live in close proximity, perhaps in a divided-up house, or where the child moves between them regularly. Another quite common example occurs where a child is at boarding school and his holidays are split between the parents.

5.35 Concern about a sharing arrangement stems from the risk that the child may have no primary caretaker, in the sense of a person who is solely responsible for his welfare and with whom he has a secure "basecamp". With older children they may, by moving around, lose their sense of identity and break continuity of schooling or friendships. The child, it is feared, may fall between two homes. The judges did, however, recognise that parents may put into practice a sharing arrangement following an order which nominally gives sole care and control (or custody) to one of them. Indeed one judge said that such orders are the usual request even in pure sharing cases. He felt there was value, in all cases, in one parent being nominated as the responsible one, if only to seek to avoid later disputes: sharing merely "stores up future problems".

5.36 It seems that some judges' caution about shared care may go to the length of ordering a welfare report or even refusing the declaration of satisfaction until arrangements are changed. Others are relatively fatalistic and will (perhaps reluctantly) make a custody order and declare satisfaction. The more typical form of sanctioning shared care and control may be to order simply "joint custody" or, even, to make no order at all.

5.37 Several judges thought the sharing of care and control may be a "relatively middle-class option" on account of the extra resources required to make it work. However another suggested that in his experience an order for sharing was most frequent in cases where the father was unemployed and the mother worked part-time. And another judge recalled a case of two nurses who shared care and control according

to their shift work. He thought that geographical proximity, the capacity of both parents and the child's attitude were particularly important in cases of shared care.

(6) Other Orders

(a) Orders for Care and Control Alone

5.38 In respect of a further 13 children an order for care and control alone was made, with no order for custody. The legal effect of this is similar to a joint custody order, and hence, the results have been incorporated into Table 10.[22] The care and control orders were made at Aldershot, P.R.F.D. and Wandsworth; only three of them gave care and control to the father. Of these thirteen children who were subject to orders for care and control while no custody order was made, seven were aged 11-15 and eight were girls. As for joint custody, it would seem that more of such orders are made in respect of older children although four were made in respect of under-5's and, in any event, the total is small.

(b) Divided Custody

5.39 Returns from nine courts enabled us to find that 83 (or 3.1%) of children out of 2,701 children in respect of whom a custody order was made were split up between their parents.[23] Figures ranged from 8.9% (Middlesbrough) and 7% (Altrincham) to 0 (Durham). Of the 83 children who were separated, 69 were over 5 and the likelihood of division of the family increased with age. The lower rate of splitting up of younger children seems to reflect judicial reluctance. Further, older children are clearly more able to determine for themselves where they will live and to maintain relationships without sharing a home.

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22 See para. 2.37 of the Working Paper.

23 In the Wolfson study 4.9% of 406 orders made by divorce courts were for divided custody: op. cit. Part III n. 2, Table 33.

(c) Split Orders

5.40 None of the judges interviewed recalled having made an order giving custody to one parent and care and control to the other. Several could not see the use of such an arrangement in the normal case. One was aware of the Court of Appeal's disapproval of split orders[24] but another thought that they might be useful in a contested case.

B. Orders for the Retention of Parental Rights

5.41 In proceedings under the 1971 and 1978 Acts the court does not have power to award joint custody. Instead it may order that a spouse or a parent who is not granted legal custody retains all or specified parental rights and duties jointly with the person granted legal custody.[25] During the period of our domestic court survey, only two such orders were made, both in the same court. These orders provided (a) for the retention (in relation to girls aged 15 and 14) of all rights except actual custody; and (b) for the retention (in relation to a boy aged 3) of rights in respect of the child's education. Both orders were made in proceedings under the 1978 Act.

5.42 Orders for the retention of parental rights are the closest equivalent to joint custody available in domestic courts, but they appear to be rarely made. Solicitors in the area of the court which had made the orders recorded in our survey reported that such orders are not infrequently made by that court. However, most solicitors had never been involved in any case where such an order had been made, and had never considered recommending a request for one. The device by which the court first grants legal custody to one parent and then 'claws back' rights to be retained by the other was regarded as too tortuous a process

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24 For example in Dipper and Caffel, op. cit. nn. 14 and 18 respectively, and Williamson v. Williamson (1986) 16 Fam. Law 217.

25 Except the right to the child's actual custody: 1971 Act, s. 11A(1); 1978 Act, s. 8(4). See also paras. 2.45 - 2.48 of the Working Paper.

for the average magistrates' court user to grasp. It was said that even on the unusual occasions when such orders are sought, magistrates dislike making them. In particular, there was said to be a strong reluctance to order the retention of all rights except actual custody. Such requests for 'general' orders will usually be met by an insistence that the solicitor provide a list of specified rights, at which point the idea may be dropped altogether or the solicitor will furnish a list of all the parental rights that immediately come to mind. Even where the parties are agreed in seeking such an order, the court may discourage the idea, taking the view (shared by some solicitors) that if parents can work together an order is unnecessary but that, if they cannot, it is inappropriate (an attitude which two solicitors criticised for its insensitivity to the psychological needs of parents and children).

5.43 Other instances of such orders mentioned by the solicitors in the North East included an order in favour of the (ex-cohabitee) father of an illegitimate child where there had previously been problems in ensuring that the child received proper medical treatment;[26] and an order relating to matters of education and religion in a case where the father was a practising Roman Catholic but the custodial mother was not. In a third case, a non-custodial mother's request for a general order was refused in favour of an order for the retention of specified rights relating to education, religion and serious medical matters. In the South West group, three solicitors had had experience of cases where orders for the retention of parental rights were made. One Plymouth solicitor had seen general orders made and, indeed, had not appreciated the possibility of orders in relation to specified rights only. Another Plymouth solicitor whose only request -for a general order - had been met with an insistence

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26 Although in one sense such a father could not "retain" parental rights, which he had not previously held; see section 11A(1) of the 1971 Act and para. 2.46 of the Working Paper.

that the desired rights be specified, expressed the view that it was undesirable and artificial to draw up a list, but a third solicitor considered that a specified list is preferable to a general order so that the custodial mother knows exactly what her position is. This solicitor finds that such orders are helpful, but are a poor substitute for joint custody orders, of which he is strongly in favour. In his experience, such orders might commonly specify decisions on education, religion, residence and, as in one case he had dealt with, 'general moral welfare'.

5.44 Some magistrates had never encountered a request for an order for the retention of parental rights, and were unaware of their power to make one. Others had encountered such requests, generally from middle-class parents seeking, in effect, joint custody. Specific cases recalled were: one where the application was for a general order and both solicitors opposed the bench's request that a list of specified rights be drawn up; one where the application related to a child suffering from a bone disease, whose father was moving out of the area and wanted to be sure of receiving all medical reports (regarded as a "wholly appropriate" case for an order); and one where the court ordered a welfare report on an agreed application for specified rights because it was not satisfied that the parents appreciated what they were agreeing to. In that case, the court ultimately made the order requested but feared that it would lead to conflict.

5.45 In the three month survey of ten county courts, where 54 children were made subject to custody orders under the 1971 Act, there were four cases in which an order was made for the retention of parental rights, two of which were made by consent. All of the orders were made when mothers were granted legal custody. Three of them were made in courts with high joint custody returns: P.R.F.D. and Aldershot and Farnham. From our interviews it seems that because of the extreme

degree of breakdown of relations in some of the cases which come before the county court as emergencies[27] there is often no question of parents co-operating over the upbringing of their children.

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27 See para. 2.15 above.

PART VI

ACCESS

6.1 The statistics presented in this Part indicate that in the great majority of cases a custody order is accompanied by an access order in favour of the parent or spouse who is not living with the child. Details (or 'definition') of access are contained in relatively few orders, the parties themselves generally being expected to work out their own arrangements. The high proportion of access orders made in all the proceedings we studied suggests a belief that the continued contact of the child with his parents and others who have fulfilled the role of a parent in his life is in the child's best interests.[1]

A. The 1971 and 1978 Acts

6.2 In our study of proceedings under the 1978 Act, 106 custody orders were made, accompanied by 102 access orders. Under the 1971 Act in domestic courts there were 80 access orders following 83 custody orders, in addition to three orders simply for access and three other cases in which access was applied for and refused. Therefore ten cases under both Acts did not involve an access order, in only one of which was custody awarded to the father.[2]

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1 See Part IVB of the Working Paper.

2 This indicates that a higher proportion of access orders was made by the domestic courts than was found in the magistrates courts which had been used by spouses in Wolfson study prior to their divorce. In that study 13.2% of cases involved no provision for access, op. cit. Part III n. 2, para. 5.8.

6.3 We have more detail concerning applications for access under the 1971 Act: of 72 access orders which were made in favour of fathers[3] only 22 were the subject of a formal application or cross-application. 20 of fathers' applications concerned illegitimate children. Whilst eleven access orders were made in favour of mothers, in only one case did a mother apply for access and she was refused. Eight of mothers' access orders were made in respect of legitimate children. Hence, it may be that the magistrates themselves raise the issue of access.

6.4 In 15 cases (7.5% of the total sample) there was a contested hearing over access, that is more than twice the number of custody disputes. Three of these cases were heard under the 1978 Act, two of which resulted in access being refused, the other in an order for reasonable access. Of the other 12 cases under the 1971 Act, ten concerned illegitimate children. These cases resulted in five orders for defined access, three for reasonable access and four in which access was refused. A welfare report was available in nine contested access hearings, all under the 1971 Act. Defined access was awarded in a further five cases, all of which were uncontested, four of which were under the 1971 Act.

6.5 All the magistrates interviewed were strongly in favour of access to children by non-custodial fathers following marriage breakdown, and were quite satisfied with the standard form of order used in proceedings under the 1978 Act, in which provision for reasonable access is automatically included unless some contrary direction is given.[4] Most would wish to encourage mothers to foster and facilitate continued

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3 Mothers received custody in 71 cases and fathers' access was ordered in 69 of these; see Table 4 in the Appendix.

4 Magistrates Courts (Matrimonial Proceedings) Rules 1980, Form 13.

contact between the children and the other parent. Many of the solicitors commented on the high level of scepticism amongst mothers in relation to fathers' requests for access. It was the general policy of solicitors to advise mothers to agree to generous access on the basis that if the father's request is not genuine access will wane; if the father's interest is genuine access will usually be of considerable benefit to the child.

6.6 Magistrates had a more cautious attitude towards requests for access by fathers of illegitimate children. Most magistrates considered that access could be a good thing, provided that it was 'feasible' in the particular case and the father was shown to be sincere and genuinely concerned for the child, and not merely using the application as a means of 'getting at' the mother. However, most also expressed one or more of a number of specific reservations. Two magistrates (interviewed jointly) considered that they may be prejudiced against access on the basis that it is likely to be better for each parent to go his or her own way; that the mother will be more likely to marry and have other children - and that her life will generally be easier - if there is no access, and that this outcome is likely to be 'better all round' in the long run. Two more (also jointly interviewed) considered that they were generally favourable to fathers' access applications, but also mentioned the need to consider the mother's feelings and take care not to foist upon her a relationship which she does not wish to continue and which may interfere with the child's welfare and with the mother's prospects of marriage. Several magistrates remarked that a father's application for access is in fact often prompted by the mother's marriage to a man who will accept her child. Access is most likely to be ordered if there has been a fairly steady relationship between the mother and father. It was also observed that in affiliation applications which are not combined with an application under the 1971 Act, it is often obvious that the parents are still seeing each other.

6.7 The county court survey provided two results similar to those found in the domestic courts for proceedings under the 1971 Act. Although the percentage of access orders made in combination with a

custody order was relatively low, it represented the majority of instances.[5] Of 46 custody orders in favour of mothers, 34 involved access to fathers. Out of 8 cases in which custody was granted to fathers, in 5 access orders were made. Hence, access was ordered in conjunction with 72% of custody orders. Secondly, all of the orders simply for access were in favour of fathers of illegitimate children.

Grandparents' Access

6.8 In limited circumstances grandparents may apply under the 1971 or 1978 Acts for access to their grandchildren.[6] Most solicitors had experience of consultations by grandparents regarding rights of access, but few had actually handled proceedings on the matter, whether by intervention in a divorce or by means of an application under the 1971 or 1978 Acts.[7] Nevertheless, the possibility of proceedings is discussed and grandparents want to know what their rights are. The general view was that grandparents do not persist or, possibly, armed with the knowledge that proceedings can be brought, manage to reach agreement with custodial parents. It was said that custodial parents never enquire about grandparents' rights unless proceedings have been threatened, but non-custodial fathers may ask about their parents' position. The solicitors' experience (albeit based on a very small number of cases) was that grandparents do not fare well in proceedings: courts (and welfare reports) are not inclined to go against a custodial parent's wishes and are reluctant to overload a case with orders.

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5 One hypothesis for a lower return is the number of violence cases involved: see para. 2.15.

6 1971 Act, s. 14A, 1978 Act, s. 14. See paras. 2.55 - 2.57 of the Working Paper.

7 No record is kept of access orders in favour of grandparents on divorce; and in our surveys no orders were made under the 1971 and 1978 Acts in favour of grandparents.

6.9 A majority of magistrates had dealt with grandparents' applications for access, arising from a wide range of situations. Thus, applicants had included parents of a deceased parent where the son-in-law had remarried; and grandparents who had effectively brought up the child for some time and whose daughter or daughter-in-law was seeking to 'break away'. One magistrate recalled a case where a father's application for access to his illegitimate child was refused but his mother's application was granted: the court anticipated that the father would see the child in those circumstances and were not averse to that probability. In theory, most magistrates would take a favourable attitude towards grandparents' access applications, because of their view that children need all the help and support they can get from the extended family. Nevertheless, two felt that they would view applications with caution and suspicion, and the general view was that a formal order would be a last resort and that much would depend on the nature of the parental objection to access. Two magistrates considered that an order would be most likely in the case of an application by paternal grandparents where the father was not on the scene: where, for example, the grandparents were seeking to establish access effectively on his behalf during his absence abroad.

B. Divorce

6.10 In 1985 65,333 orders were made granting or defining access by the divorce county courts, of these 5,757 (or 9%) were orders defining access. Access orders therefore amounted to 80% of the total number of custody orders. The returns may reflect a substantial increase in access orders since the previous studies, for example the Wolfson study which found access orders in around 53% of the 404 cases in which the divorce court made a custody order.[8] However, the 1985 results include cases in

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8 Op. cit. Part III n. 2, para. 5.7.

which more than one access order was made, for example following an application to vary access. Variation may be required because of a general reluctance to order anything more precise than 'reasonable access' in the first instance so that later definition may be sought. And, as one judge pointed out, defined access orders themselves may become quickly out of date, so that further variation may be needed.

6.11 However the individual court survey which we undertook indicates that the initial ordering of access is high. The Wolfson study found much regional disparity in the ordering of access,[9] whilst our survey found a consistently high return of over 80%, as is shown by Table 11 in the Appendix, which records the proportion of access orders made following sole custody orders in each of the ten courts. Although the aggregate proportion was the same following wife and husband custody orders, there was quite a wide fluctuation in ordering access when sole custody was granted to the husband. One hypothesis for this variation is that when a mother's access is possible, and in the children's interests, the courts are more likely to award her sole or joint custodial status.

6.12 When joint custody was ordered the percentage of access orders made was 90%, as shown by Table 12. One judge commented that access does not tend to be a problem in joint custody cases (perhaps by definition of the type of cases involved). As has been described earlier[10] it is axiomatic in most cases that access is taking place before joint custody will be ordered.

6.13 From our interviews it would appear that the high percentage of access orders reflects the concern of the judges that access should be

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9 Ibid., Table 36.

10 Para. 5.29.

encouraged. All the judges make a point of inquiring as to the child's contact with the non-residential parent, and several assume that an order will be made in each case unless there is a reason not to do so. If the custodial parent is recalcitrant over access, the court will stress the importance of contact for the child's welfare, as well as a matter of the child's entitlement. Several judges also talked about the non-custodial parent's "entitlement". When the non-custodial parent is out of touch with the child it seems to be common for an access order to be made to encourage resumption of contact. Several judges take active steps to resuscitate access, for example by adjourning the children's appointment, perhaps for the non-custodial parent's attendance or for the welfare officer to visit him.

6.14 The majority of judges said that an order for reasonable access would be made irrespective of the child's age, although several took the view that if the children were older such an order may be unnecessary. By 'older', one judge thought that 12 years old was the average cut-off point, although it may be even less if the child's siblings were over that age.

6.15 A second factor which may have increased the access returns is a change in the form which is used when a custody order is made at the same time as the decree nisi. This form (since February 1985) includes a provision that whoever is specified in the allotted space "do have reasonable access" to the children.[11] Hence the presumption in each case is for reasonable access. Previously, provision for access had to be written into the divorce form by the clerk, whereas in the magistrates' courts' form the access provision had to be deleted. The Wolfson study noted a high percentage of access orders in magistrates' courts in 1974.[12]

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11 Form D61.

12 Op. cit. Part III n. 2, para. 5.8.

The change from an opting in to an opting out in divorce courts may have influenced the completion of the forms by the clerks. At P.R.F.D., however, where old forms were still in use during our survey period, the proportion of access orders was as high as in other courts.

6.16 The judges interviewed explain reasonable access as "reasonable to all the parties, including the child", "what you agree" or "it depends on your common sense". However one judge did not favour orders for reasonable access on the ground that they may often "mean no access at all". He deliberately gives the parties guidance on the optimal arrangements, believing that to establish a certain structure assists, as far as possible, in the elimination of friction and the exercise of access. He prefers that there be fortnightly staying access, except for young children for whom staying may not be possible and teenagers for whom a monthly stay may be more realistic. In this court, therefore, there is a relatively high proportion of defined access orders although, as with custody, the nominal content of orders is not always seen as particularly important; a reasonable access order may mask a more defined arrangement which has been made. Another judge who thinks in terms of similar guidelines said that he is unlikely to make an order which specifically defines access. Indeed the terms of the order itself may depend on the work of the clerk rather than the words of the judge.

6.17 In 1985 defined access formed 9% of all access orders.[13] Courts with particularly high rates of definition were among those with the highest joint custody rates.[14] High returns of defined access may

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13 Similar proportions were found in the Keele and Wolfson studies: op. cit. Part III n. 2, at p. 200 and para. 5.7 respectively.

14 Barnstaple, Truro, Slough, Cardiff, Cambridge, Edmonton, Tunbridge Wells and Reigate.

therefore reflect a relatively 'active' approach to the children's appointment in those courts. Otherwise it seems that access is defined largely in cases of dispute.

6.18 Orders refusing access formed 3.3% of all access orders made.[15] The courts which have relatively high rates of refusal also seem to be more likely to define access. These courts may pronounce on the matter of access in each case. Variation in the number of orders refusing access may, however, reflect different interpretations of the new form. Either a striking out of the provision for access or simply leaving the space provided empty may be interpreted for statistical purposes as a 'refusal'.

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15 Hitherto orders refusing access have not been counted as 'access orders'.

PART VII

ORDERS IN FAVOUR OF NON-PARENTS, LOCAL AUTHORITY CARE AND FOR SUPERVISION

7.1 This Part examines the available information on orders giving custody to persons other than the child's parents (or the parties to the marriage before the court, if different), committing the child to care or placing him under supervision.

A. Custody to Non-Parents

7.2 In the great majority of cases custody of a child on divorce is granted to one or both of the spouses involved. Most of these spouses will also be the child's parents[1] although some cases, for example the divorce of a parent and a step-parent or of private foster parents who have treated the child as a child of their family,[2] may result in custody being awarded to a parent of the child who is not a party to the marriage.

7.3 Lord Chancellor's Department figures indicate that, in 1985, divorce county courts made around 400 orders giving custody to third parties, which represent 0.5% of all custody orders made. It is not clear whether this figure includes orders in favour of parents who were not parties to the marriage being dissolved.[3] In one third of the divorce courts no such orders were made and in the remainder of courts the returns were evenly spread. Courts which made more than ten orders in

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1 See Part IV n. 27 above.

2 Matrimonial Causes Act 1973, ss. 42(1) and 52(1).

3 Presumably such cases are 'other' orders since courts are instructed to count orders in favour of third parties as 'others', see Part IV n. 30.

favour of third parties were at Bristol, Oxford, Derby, Nottingham and Scunthorpe. Relatively large returns were also found in several Northern cities: Liverpool, Leeds, Manchester and Lincoln. In our ten court survey only one such order was made.

7.4 The interviews with judges revealed that intervention in divorce proceedings is usually by relatives of the child, particularly grandparents. No judge had heard of an individual being refused leave to intervene.[4] Several judges mentioned that young grandparents are increasingly involved in taking care of their grandchildren. However, the extended family's role in child rearing is not reflected in the number of custody orders made to third parties. The judges commonly referred to supportive relatives who back one of the parents' claims for custody and some sole and joint custody orders are made on the basis of continued family back-up. It may be that relatives or friends only seek custody when they have fallen out with the children's parents or where the parents are unfit to take responsibility. Even then the judges may be reluctant to remove the children from the custody of both their parents, preferring to grant only care and control to the interveners. In our study we came across two joint custody orders where care and control was awarded to grandparents, one with custody jointly to the interveners with the father and another with custody to both parents.

7.5 In our surveys of proceedings under the 1971 and 1978 Acts we found no evidence of custody being awarded to a third party. The magistrates interviewed recalled only a small number of cases in which such an order had been made, in most cases for a grandmother but in one case an aunt. Such a course had generally been taken with the acquiescence of the child's parents.

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4 Application for leave to intervene must be made to a registrar, from whom appeal lies to a judge: Matrimonial Causes Rules 1977, rr. 122 and 124.

B. Care Committals

7.6 A child may be committed to care in family proceedings if there appear to be "exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parties to the marriage[5] or to any other individual".[6] The effect of such an order is that the child may not be removed from care, unless discharged, until he is 18, although parental rights are not transferred to the local authority.[7]

7.7 D.H.S.S. figures record the number of admissions to care each year. Until the most recent figures (1984), the majority of children who were admitted to care following orders in family proceedings were admitted after divorce proceedings. It seems that the number of such admissions has fallen in recent years, while the wardship court has made an increasing number of committals.[8] D.H.S.S. figures record that, in 1984, 330 children were admitted to care of English local authorities under section 43 of the Matrimonial Causes Act 1973. In 1982 the figure was 529. Admissions of wards of court reached 235 in 1984, a rise of 75% since 1977. In 1984 only 91 children were admitted to care following applications under the 1971 Act. Under the 1978 Act, the figure was 21. These results are set out in more detail in Table 13.

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5 Under the Guardianship Act reference to a marriage is replaced by reference to the child's parents (and also under the 1969 and 1975 Acts, see n. 6).

6 Matrimonial Causes Act 1973, s. 43(1); Guardianship Act 1973, s. 2(2)(b) and Domestic Proceedings and Magistrates' Courts Act 1978, s. 10(1). See also Family Law Reform Act 1969, s. 7(2) and Children Act 1975, ss. 17(1)(b) and 34(5).

7 In contrast, under a care order made in care proceedings the local authority receives the same powers and duties in respect of the child as a parent would have, but for the order: Child Care Act 1980, s. 10(2).

8 The figures need to be treated with some care: see n. 12 below. Wardship figures do not include committals to care under the courts' inherent jurisdiction: see Re C.B. [1981] 1 W.L.R. 379.

7.8 In 1984, admissions under the Matrimonial Causes Act 1973 formed around 6% of the total number of admissions to care under interim or full care committals by civil courts.[9] On March 31, 1984 there were 4,844 children in care in England and Wales following an order under section 43. These children formed 13% of the population of children in compulsory care under orders of civil courts.[10]

7.9 Figures supplied by the Lord Chancellor's Department indicate that 550 care committals were made by divorce county courts in 1985. This figure represents a decrease in the courts' returns since 1983 (872 care committals).[11] These statistics are substantially higher than those recorded above concerning children admitted to care each year. D.H.S.S. figures gauge the number of children involved and this would be expected to give larger returns than statistics which reflect court orders. However

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9 That is by juvenile courts in care proceedings and in all family proceedings. Figures supplied by D.H.S.S.

10 Ibid. See D.H.S.S., Children in Care in England and Wales, March 1983 (1984), Table A1. D.H.S.S. figures also show that the number of children in care in England under section 43 who are aged 10 or over has doubled between 1977 and 1984. The number of under 10's is largely unchanged.

11 Judicial Statistics Annual Report 1983 (1984) Cmnd. 9370, Table 4.9. 670 committals were recorded in 1985 according to the latest Annual Report (Cmnd. 9864, Table 4.9). However, the figure given in the text represents an amended, more accurate return.

the differences in figures may be accounted for by the collection and presentation of data.[12]

7.10 Across the country, in around one-third of divorce county courts no care committal was made in 1985. Orders under section 43 are generally scattered over the country although it seems that relatively more were made in the South and West. Largest numbers were concentrated in larger cities and towns, for example Liverpool, Southampton, Brighton, Sheffield, Cardiff and Bath. The variation in returns may reflect local authority practice in intervening in divorce proceedings, in preference to initiating care proceedings. One obvious advantage of such intervention is the relatively broadly-worded pre-condition to making a care committal under section 43.[13]

7.11 In our ten survey courts only six care committals were made (in respect of 0.2% of the children involved), three of which simply replaced a magistrates' care order. Some of the judges interviewed were

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12 D.H.S.S. figures relate to the financial year, i.e. up to 31 March, and record the child's latest 'care status'. In 1984, for example, the figure 330 represents both those children admitted to care in that financial year who, on March 31, were subject to an order under section 43 and those who are committed in the year up to March 31 who left care on or before that date and were subject to an order under section 43 on leaving care. If a child was received into care under section 2 of the Child Care Act 1980 ('voluntary care') in the financial year up to March 31 1983 but was subsequently made subject to an order under section 43 in 1984, he would be counted only as an admission under section 2 in 1983 (not under section 43, in 1984, since he had already been admitted). Hence a number of family proceedings committals are not recorded as "admissions" under the family statutes. The fall in committals under section 43 since 1982 may reflect either a real fall or an increasing proportion of children initially coming into care, by a route other than divorce, in a financial year prior to the year in which a section 43 order is made. Apart from voluntary care, such children may have been admitted subject to an interim or full care order under the Children and Young Persons Act 1969 or on remand in criminal proceedings.

13 Compare section 43 with the specific conditions required by section 1 of the Children and Young Persons Act 1969 in care proceedings.

familiar with local authority intervention, usually when the child was already in voluntary care. Other judges were less familiar and some demonstrated grave reluctance to commit the child to care. One judge typically makes a short term care order while the child is returned home.[14] Several judges were unable to recall a contested committal to care. Cases which identify a child at risk who is not previously known to social services were said to be extremely rare.

C. Supervision Orders

7.12 A supervision order may be made in family proceedings if there appear to be "exceptional circumstances making it desirable that the child should be under the supervision of an independent person".[15] The supervisor may be a local authority or a probation officer.

7.13 D.H.S.S. figures show that 2,680 children were placed under an English local authority's supervision by divorce courts in 1982-3.[16] A further 556 children were made subject to such supervision following applications under the 1971 Act and 289 under the 1978 Act. The number of children made subject to supervision orders in divorce and other matrimonial cases each year has declined since 1980, as is shown by Table 14, over.

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14 Although no provision for limiting the duration of the court's order is apparent on the face of the statute.

15 Matrimonial Causes Act 1973, s. 44(1); Domestic Proceedings and Magistrates' Courts Act 1978, s. 9(1); Guardianship Act 1973, s. 2(2)(a); Family Law Reform Act 1969, s. 7(4); Children Act 1975, ss. 17(1)(a), 34(5) and 36(3)(b).

16 D.H.S.S., Supervision Orders and Intermediate Treatment, Year Ending 31 March 1983, England (1984), Table 2.

Table 14 Children Made Subject to Supervision Orders in Family Proceedings Each Year

Jurisdiction	1980	1981	1982	1983
Section 44(1) of MCA 1973	3,271	3,179	2,950	2,680
Section 9(1) of DPMCA 1978	347	338	273	289
Section 7(4) of FLRA 1969	82	99	118	103
Section 2(2)(a) of GA 1973	512	526	439	556
Section 17(1)(a) of CA 1975	12	17	48	27
Total	4,224	4,159	3,828	3,655

Source: D.H.S.S., Supervision Orders and Intermediate Treatment, Year Ending March 31 1983, England (1984), Table 2. Figures relate to English local authorities only.

7.14 Records of children subject to probation service supervision combine orders made in matrimonial proceedings in divorce and domestic courts and cover England and Wales.[17] There were 3,750 children made subject to probation supervision under these Acts in 1982. This indicates a decrease of 330 since 1980.[18] The number of children made subject to orders made in other family proceedings in 1982 was 170, a fall of 40 since 1980.[19]

17 The most up-to-date figures for a complete year are for 1982, see Probation Statistics, England and Wales 1983 (1984), para. 1.1.

18 Half yearly figures for 1983 indicate an acceleration in the decrease, ibid., Table 8.1.

19 That is, under the Guardianship Act (90), in wardship (70) and under the Children Act (10). Since 1979 only the number of orders made in wardship has increased, ibid., Table 8.1.

7.15 Hence, the total number of children made subject to new supervision orders in 1982 under divorce and other matrimonial legislation was 6,973, 54% of whom were supervised by the probation service. It is not known what proportion of the 54% of probation supervision orders followed orders made under the 1978 Act. 90% of local authorities' matrimonial supervision was ordered under the 1973 Act. In other family proceedings 78% of the 775 children made subject to supervision orders in 1982 were placed under local authority supervision.

7.16 The total number of children under local authority supervision in England following an order made in divorce proceedings has risen from 3,816 in 1974 to 14,877 in 1983. Children subject to such orders made under the Guardianship Act have also increased considerably, from 188 in 1975 to 2,438 in 1983.[20] In the same period the number of children supervised under the 1978 Act has declined from 2,934 to 1,962.[21] The fall may be attributable to use of the probation service in magistrates' courts.[22]

7.17 Probation service records also indicate that 14,060 children were under their supervision in 1983 following divorce or domestic proceedings.[23] In 1971 the figure was 9,350 and, in 1980, 15,130. The combined D.H.S.S. and probation service figures show that 30,899 children were subject to divorce and other matrimonial supervision in 1983.[24]

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20 The power to make supervision orders (in the Guardianship Act 1973) was implemented in 1974.

21 Op. cit. n. 16, Table 2.

22 Although probation statistics do not provide specific evidence of the number of such orders per annum.

23 Op. cit. n. 17, Table 1.2.

24 Excluding Welsh local authorities and taking the probation figures for June 30 1983. Op. cit. n. 16, Table 2, and n. 17, Table 1.2.

In 1964 the figure was only 2,723.[25] The number of children supervised has decreased since a peak of 33,430 in 1980-81 which may reflect the fall in the child population and an increase in the number of orders being terminated or lapsing (up by 1,000 between 1980 and 1982).[26] Since around 1977 there have been a larger number of children under local authority rather than probation service supervision in the matrimonial jurisdictions. However more new orders are still made in favour of the probation service. Hence, the latter's orders seem more likely to lapse and/or be revoked. One reason for this may be the close relationship between divorce court welfare officers (who are employed by the probation service) and the divorce courts. In some cases courts may decide to make short term supervision orders in favour of the probation service (see below) and, in others, the welfare officers themselves may be more prepared to seek revocation than local authorities.

7.18 On June 30 1983, following orders in other family proceedings, only 770 children were supervised by the probation service, the same figure as in 1978.[27] Combined figures for both agencies show that 3,686 children were subject to such supervision in 1983,[28] a rise of 1,206 since 1978. The rise is largely determined by an increase in orders made in Guardianship of Minors Act proceedings in favour of local authorities.

7.19 The welfare agencies' figures record the children under supervision rather than the number of orders made. Even allowing for more than one child being made subject to each supervision order, the divorce courts record a considerably lower number of orders made than the records of D.H.S.S. and the Home Office would suggest. In 1985

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25 Including Welsh local authorities: figures supplied by D.H.S.S.

26 Ibid.

27 Op. cit. n. 17, Table 1.2.

28 See n. 24.

1,503 supervision orders were made under section 44(1) of the Matrimonial Causes Act 1973, approximately three times the number of care committals and 2% of the number of custody orders made.

7.20 Of the 1,053 supervision orders recorded by the courts in 1985, the number of orders, as a proportion of the number of custody orders made, was largely consistent amongst the circuits, with only the Northern Circuit registering low returns. However, individual differences in totals amongst courts were considerable: from 76 (Portsmouth) and 67 (Liverpool) to none in 25 courts, including, for example, Newcastle. Higher numbers of supervision orders were not only recorded in courts which serve inner city areas. From the interviews with judges it seems that courts which take a particularly 'active' approach to the children's appointment may be more likely to order supervision. Some courts seem also to use supervision more flexibly than others. The most often cited and, indeed, the only rationale for supervision in some courts, is to protect the child from apprehended harm. Two judges, moreover, spoke of making short-term supervision orders as a means of checking up on the children's welfare.

7.21 Several courts which had particularly high proportions of joint custody also figure prominently in the category of courts with high supervision returns (Cambridge, Worcester, Guildford, Tunbridge Wells and Reading). This may indicate the use of supervision to facilitate joint arrangements particularly in cases where there has been discord or one parent does not trust the suitability of the other to care for the child.

7.22 Supervision may also be used to help parents adjust to life after divorce. In particular, all the judges interviewed except one were prepared to order supervision of access to the children. However one judge was unwilling to "saddle" the child with a supervision order on account of his parents' difficulties. Two other judges commented that supervised access was unpopular with supervisors because of pressure on resources and the timing of access visits out of work hours.

7.23 The preferences of supervisors were also acknowledged by the courts which make finite supervision orders. One judge said that open-ended orders undermine parents' confidence and another preferred that the extension of supervision should have to be justified, rather than its termination. On the other hand one judge makes unlimited term orders because a fixed date permits parents to make merely temporary improvements, as a means of evading official scrutiny in the long term. The majority of courts provide for revocation of supervision without attendance in court when all parties are agreeable.

7.24 In our ten court survey only 22 supervision orders were recorded, 0.75% of custody orders made. 73% of those orders were made in favour of the probation service. Of the six local authority orders, five were made when the children were in the care of their mothers. probation service supervision orders were made equally in respect of children resident with their mothers and fathers. Surprisingly over 50% of supervision orders were made with joint custody orders. All of these were made in Southern courts with high numbers of joint custody orders (Guildford, Exeter and Wandsworth) which seem to confirm the link between joint custody and supervision noted in paragraph 7.21.

7.25 In the course of the domestic court survey, a supervision order was made in six Guardianship of Minors Act cases (3% of the overall sample; 6.5% of the cases under the 1971 Act). In two cases the order was made following a change in actual custody in contested custody proceedings. Three supervision orders were made in one court, representing 9% of that court's cases. This court was the only one to have made orders for the retention of parental rights.[29]

7.26 Most magistrates had dealt with cases in which a supervision order had been made, usually in relation to problems over access. A

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29 See para. 5.41.

supervision order would also be made if there was some doubt about the parent's adequacy; for example, if the parent was a young unmarried mother, or, even, if a father were awarded custody. The first suggestion of a supervision order would usually come from the welfare report, but several magistrates foresaw cases where the solicitors could provide the court with all the information it needed, and a supervision order would be made without that prior recommendation. The supervisor appointed would usually be a probation officer in the case of an older child, and the social services department in the case of younger children. The magistrates expressed a general preference for using probation officers, because of their greater contact with the service. However, if the social services department was already working with the family it would be more appropriate to use that department. Furthermore, evidence of the social services department's involvement with the family might be a sufficient reason for not making a supervision order in a case where it would otherwise be indicated. If the views of the social services department were not already clear from the welfare report, its opinion would be sought. The court would, if necessary, make a supervision order against the wishes of social services, though it would always be best if the proposed supervisor saw the need for an order.

PART VIII

CONCLUSION

8.1 The information presented in this paper has been gathered from court-based and solicitor-based sources. It can only give secondary evidence of the perceptions of the litigants and children involved.[1] However, our survey indicates that a strong body of locally developed "rules" play a role in determining applications made in respect of children.[2] The operation and divergence of these rules needs to be examined in the light of the law's aim to further the 'best interests' of those children.[3]

(a) The Need for Court Orders

8.2 It was noted in the Working Paper that the futures of at least 170,000 children were considered under the custody jurisdictions in 1984.[4] Using the latest available figures, it seems that around 110,000 custody orders are made each year,[5] many relating to more than one child, the great majority of which are accompanied by access orders.[6] It has been

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1 For studies of the 'human' side of the divorce process see Murch, Justice and Welfare in Divorce (1979), and the sources therein, and Mitchell, Children in the Middle (1985).

2 See also Mnookin, "Bargaining in the Shadow of the Law. The Case of Divorce" [1979] C.L.P. 65.

3 Guardianship of Minors Act 1971, s. 1.

4 See Part I n. 6 in the Working Paper.

5 In divorce around 87,000, including an estimated 5,000 at the Principal Registry. Under the Guardianship of Minors Act around 10 custody orders in the Principal Registry, 1,757 in county courts and 8,500 in magistrates' courts. In magistrates' matrimonial proceedings a further 9,400 custody orders were made in 1984. These figures exclude interim orders.

6 See Part VI.

found already in studies of divorce,[7] and is confirmed in Part III for magistrates' courts, that the proportion of custody cases which are contested is small, relative to the number of cases which come before the court.[8] Rather, a custody order seems often to result from the practices of welfare agencies, for example in relation to claims for housing or supplementary benefit, or from the advice of solicitors, or from the initiative of the court ancillary to other proceedings.[9] Solicitors interviewed assume that in matrimonial proceedings custody orders are "part of the package" in most cases. In this they are backed by courts' expectations that orders will be made. Hence, in our surveys custody was ordered in over 90% of divorces and in all but one of the completed magistrates' proceedings.[10] Nevertheless the usual order of the court, conferring custody upon one party, is often perceived as bringing wide-ranging repercussions for both parties' legal relationship with their children. The solicitors interviewed, for example, believed that clients generally equate custody with exclusive control over the child's upbringing.[11] It seems that it would be less confusing, and in some cases less damaging, were there to be less pressure from all sides towards obtaining a court order.

(b) The Range of Orders

8.3 The statistics we collected confirm that in the great majority of cases women care for children after separation and divorce. The

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7 See Maidment, Child Custody and Divorce (1984), pp. 61-62.

8 Paras. 3.2 and 3.3.

9 Paras. 2.6 - 2.15 and paras. 3.4 - 3.8. Other practical considerations include the attitudes of schools or education authorities towards divorced parents not living with their children, see para. 5.19.

10 Paras. 3.6 and 3.4, respectively.

11 Para. 5.20.

factors underlying this are profound and various. However, we encountered substantial support amongst courts and solicitors for female child care (and, where practicable, male paid employment as a matter of principle).[12] Some solicitors were clearly cautious about fathers' prospects of success in contesting custody.[13] In no case before a domestic court in our survey did a father's custody claim succeed over a mother's objection.[14]

8.4 Similarly, on divorce, it seems that courts' and solicitors' perceptions of the appropriateness of joint custody partly explain the regional variation in these orders.[15] Opinions on the merits of joint orders are divergent and strongly held.[16] Solicitors acknowledged that tactical applictions, at least those in favour of joint custody, were made in certain cases.[17] Their advice to clients could differ accordingly. A client who perceived a joint order as a threatening interference by the other party could be told that joint custody is simply "a matter of words".[18] Conversely, a client who had to be dissuaded from contesting the actual care of the child could be offered joint custody as an important ratification of his continued parental role.[19] Moreover, in some courts

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12 Paras. 4.9 - 4.17 and 4.26.

13 Para. 4.16.

14 Para. 4.4.

15 Paras. 5.2 - 5.16.

16 Paras. 5.17 - 5.26.

17 Para. 5.11.

18 Para. 5.16.

19 Paras. 5.11, 5.16 and 5.20. C.f. paras. 5.21 and 5.22. The same dexterity of argument may be employed over access orders, see para. 6.5.

nomination of a sole (rather than joint) care-taker for the child may be a necessary step towards obtaining a declaration of satisfaction because of judicial reluctance to sharing arrangements.[20]

8.5 In the light of the discretion conferred on the courts by the 'best interests' principle, uniformity in orders cannot be expected. However, at present the venue at which a child's parents divorce may play an important part in the framework of orders made to govern their future relations. Differences of approach amongst divorce courts was found on every matter which permits contention, except that where possible children should maintain contact with both parents. A whole range of policy issues from joint custody and shared care and control to defined access and the use of supervision orders would clearly benefit from exchange of views between judges and others involved.

8.6 Apart from differences over substantive policy, divergence amongst practitioners is also attributable to uncertainty over the tools of the trade. Differences between the orders available in the various custody jurisdictions, for example between custody and legal custody, and custody and care and control, do not seem to be helpful in practice. Indeed the popularity of joint custody orders may be largely a reaction to the problems caused by 'sole' orders. Moreover, the similar power to order retention of parental rights and duties seems to be difficult for litigants to understand and for practitioners to operate.[21] To define, and to distinguish, the effects of the orders available to the divorce court presents further difficulty. Even some judges who consider that 'custody' means 'care and control' nevertheless separate the concepts when giving care and control to third parties. The reported perception of divorcing parents that sole custody gives one parent virtually complete control over

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20 Para. 5.36

21 Paras. 5.42 - 5.44.

the child's upbringing is at odds with most of the interviewed judges' interpretation of the law.[22] The range of orders available needs to be simplified, clarified and brought into line across the jurisdictions.

8.7 It seems that for parents (and spouses) and for the agencies which encourage orders to be obtained, the primary concern is to resolve the basic issue of who is to look after the child. Parental responsibilities other than residential and visiting questions are rarely raised.[23] The most helpful order in many cases would deal with the child's residence, with whom he may stay and whom he may visit for shorter periods. It should seek to avoid giving the, often false, impression that other persons are being shut out of involvement in the child's life.

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22 Paras. 5.17 - 5.19

23 See for example, paras. 5.25 and 5.42 - 5.44.

Table 1 Progress of Financial Applications to Six Domestic Courts under the 1978 Act[a] n. = 209

Application	Total	WHERE NO CHILDREN INVOLVED			WHERE CHILDREN INVOLVED		
		Withdrawn or Adjourned	Order Refused	Order Made	Withdrawn or Adjourned	Order Refused	Order Made
s. 2[b]	156	17	3	4	72	2	58
s. 6[c]	53	0	0	1	5	0	47
Total	209	17	3	5	77	2	105

Notes to Table 1.

a During three months of 1985.

b Orders for financial provision.

c Agreed payments orders.

Table 2 Progress of Applications to Six Domestic Courts under the 1971 Act[a] n. = 136

			ILLEGITIMATE CHILDREN			LEGITIMATE CHILDREN		
	Application	Total	Withdrawn or Adjourned	Order Refused	Order Made	Withdrawn or Adjourned	Order Refused	Order Made
s. 9	by mother	83	6	0	15	19[b]	0	43
	by father	53	4	3	15	18	0	13
	Total	136	10	3	30	37	0	56

Note to Table 2.

a During three months of 1985.

b This figure includes one case which, though recorded in the court register as a refusal of order, was in reality withdrawn following agreement between the parents as to maintenance.

Table 4 Results of Proceedings under the 1971 Act n. = 89

Father's Application Legitimate	Father's Application Illegitimate	ORDER		Mother's Application Legitimate	Mother's Application Illegitimate
3[a]	8[e]	LEGAL CUSTODY TO MOTHER	No access	41[j]	2[k]
1[b]	1[f]		Reasonable access	2	9[l]
			Defined access		4[m]
1[c]		LEGAL CUSTODY TO FATHER	No access		
8[d]	3[g]		Reasonable access		
			Defined access		
	3[h]	ACCESS ONLY (On father's application for access only)	No access		
	3[i]		Reasonable access		
			Defined access		
13	18	TOTAL		43	15

a 2 cases contested on custody: welfare report available in each; no change in actual custody.
1 case: father's application for custody order in favour of mother.

b Contested on custody: welfare report available; change in actual custody (father to mother); supervision order made. Also contested on access.

c Contested on access; welfare report available.

d All uncontested; welfare reports available in 3 cases.

e All on father's application for access. Includes:
1 case contested on access; welfare report available.
1 case: welfare report available; supervision order made.

f Father's application for access; contested on access.

g All uncontested: welfare report available in each case.

h All contested: welfare report available in each case.

i 2 cases contested: welfare report available in both cases.

j Includes:
1 cross-application by father for access.
1 case contested on custody: welfare report available; change in actual custody (father to mother); supervision order made.
2 cases: supervision order made; welfare report available in one case.
1 further case: welfare report available.

k Welfare report available in 1 case.

l Includes:
2 cross-applications by father for access.
1 case where actual custody transferred to mother uncontested.
1 case: welfare report available.

m Includes:
2 cross-applications by father for access, both contested.
1 case contested on custody: welfare report available; no change in actual custody. Also contested on access.
1 further case: welfare report available; supervision order made.

Table 5 Ages of Children Subject to Custody and Access Orders in Six Domestic Courts[a] n. = 333

Type of proceedings		under 5	5 - 9	10 or over	Total
DPMCA 1978		84 (42%)	62	54	200
GMA 1971	Legitimate	43 (45%)	31	21	95
	Illegitimate	32[b] (84%)	5	1	38
Total		159 (48%)	98 (29%)	76 (23%)	333

Notes to Table 5.

a Including cases in which an order was refused.

b Of whom 20 were aged 1 year or under.

Table 6 Custody Orders in Divorce Proceedings (Percentages)

Study	Year of Data	Custody to Wife	Custody to Husband	Joint Custody	Others	Total Number[7]
Maidment[1]	1973	77.6	19.0	3.4	0	58
Wolfson[2]	1974	81.4	13.2	5.2	.2	424
Bristol[3]	1979-80	81.4	11.6	7.0	0	1,290
National[4]	1985	77.4	9.2	12.9	.7	82,059
Bristol (2)[5]	1985	73.0	9.6	16.9	.5	4,676
Wolfson(2)[6]	1985	72.2	9.2	18.1	.5	12,771

Notes to Table 6.

1. A random sample of 95 undefended divorce petitions involving children, which had been filed in a North Midlands county court in 1973: Maidment, "A Study in Child Custody" (1976) 6 Fam. Law 195 and 236, p. 198.

2. A study of 625 divorces involving children in 1974, from a sample of 10 courts selected to reflect a cross-section of the divorcing population: Eekelaar and Clive with Clarke and Raikes, Custody After Divorce, Family Law Studies No. 1, Centre for Socio-Legal Studies, Wolfson College, Oxford, Table 33.

3. Research into 1,500 children's appointments between May 1979 and June 1980 in five courts in the Western Circuit and two courts on the Wales and Chester Circuit: Davis, MacLeod and Murch, "Undefended Divorce: Should Section 41 of the Matrimonial Causes Act 1973 be Repealed?" (1983) 46 M.L.R. 121, 132.

4. The figures collected from the returns of 174 divorce registries in 1985.

5. The courts used by the Bristol study, updated using the figures noted in 4.

6. The courts used by the Wolfson study, updated using the figures noted in 4. These are the county courts at Birmingham, Bournemouth, Carmarthen, Guildford, Lincoln, Newcastle-upon-Tyne, Nottingham, Sheffield and Shrewsbury, and P.R.F.D. The latter's returns have been extrapolated from our own survey's results (see para. 5.30).

7. The total number of custody orders made by the divorce court, that is excluding care committals and previous courts' orders. In rows 1, 2 and 3 orders splitting the children between husband and wife have been counted as orders in favour of each of them.

Table 9[1] Custody Orders made by the Ten Courts (Percentages)[3] n. 2,927

Court	Circuit[2]	Joint Custody	Husband only	Wife only	Total Number
Aldershot and Farnham	W	17.6	4.4	77.9	136
Altrincham	N	11.2	5.3	81.6	149
Bow	SE	9.1	9.5	81.4	242
Durham	NE	5.7	9.2	83.9	86
Exeter	W	29.2	8.2	62.6	171
Guildford	SE	33.8	7.5	57.7	211
Manchester	N	2.0	8.9	89.1	293
Middlesbrough	NE	13.4	9.5	76.6	200
P.R.F.D.		28.5	6.6	64.9	1206
Wandsworth	SE	19.3	6.4	74.2	233
Total		20.9	7.3	71.6	2,927

1. The figures do not all add up to 100% because of rounding and custody orders made in favour of third parties.

2. Abbreviations refer to the court circuit, see n. 5.3.

3. In a three month period of 1985. The percentages in our survey generally correspond to the return of each court for the year. In all but three courts our survey recorded a joint custody rate which is 2.5% above the year's return. In Bow and Manchester our figures were equivalently low. In Aldershot the annual return was substantially higher

Table 10 Joint Custody Orders made by the Ten Courts n. = 612

Court	Absolute Number of Joint Orders	The Awarding of Care and Control (Percentages)			
		Care and Control to Wife	Care and Control to Husband	Shared Care and Control	Care and Control not Ordered
Aldershot	24	83	13	0	4
Altrincham	17	53	47	0	0
Bow	22	55	36	0	9
Durham	5	60	40	0	0
Exeter	50	90	10	0	0
Guildford	72	81	18	0	0
Manchester	6	83	0	0	17
Middlesbrough	27	82	0	4	15
P.R.F.D.	344	83	16	1	1
Wandsworth	45	89	11	0	0
Total	612	81	16	0.4	2

Table 11 Granting of Access when a Sole Custody Order is made. Total Access = 1,922

	Custody to Wife		Custody to Husband	
	Number of Custody Orders	Percentage of Access Orders	Number of Custody Orders	Percentage of Access Orders
Aldershot	106	76	6	33
Altrincham	124	82	8	100
Bow	197	79	23	74
Durham	73	97	8	100
Exeter	107	91	14	93
Guildford	123	80	16	88
Manchester	261	79	26	77
Middlesbrough	154	81	19	74
P.R.F.D.	783	82	79	84
Wandsworth	173	94	15	100
Total	2101	83	214	83

Table 12 Granting of Access when a Joint Custody Order is made Total Access = 537

Court	Care and Control to Wife (CCW)		Care and Control to Husband (CCH)	
	Number of CCW	Percentage of Access Orders	Number of CCH	Percentage Access Orders
Aldershot	20	70	3	67
Altrincham	9	100	8	100
Bow	12	83	8	88
Durham	3	100	2	100
Exeter	45	100	5	100
Guildford	58	86	13	100
Manchester	5	100	-	-
Middlesbrough	22	100	-	-
P.R.F.D.	284	89	56	79
Wandsworth	40	100	5	60
Total	498	91	100	84

Table 13 Children Admitted to Care Following Family Proceedings Each Year

Jurisdiction	1977	1978	1979	1980	1981	1982	1983	1984
Section 43(1) of the MCA 1973	503	448	524	605	527	529	400	330
Section 10(1) DPMCA 1978	67	54	44	32	29	15	25	21
Section 7(2) of the FLRA 1969	59	87	82	111	137	176	187	235
Section 2(2)(b) of the GA 1973	47	96	66	88	85	103	118	91
Section 17(1)(b) of the CA 1975	3	9	3	2	2	2	2	2
Total	679	694	719	838	780	825	732	681

Source: D.H.S.S. figures, relating to English local authorities only (year ending March 31).

FIGURE F.1. COUNTY COURT:CUSTODY ORDERS
JOINT CUSTODY ORDERS AS A PERCENTAGE OF TOTAL CUSTODY ORDERS
ENGLAND & WALES 1985

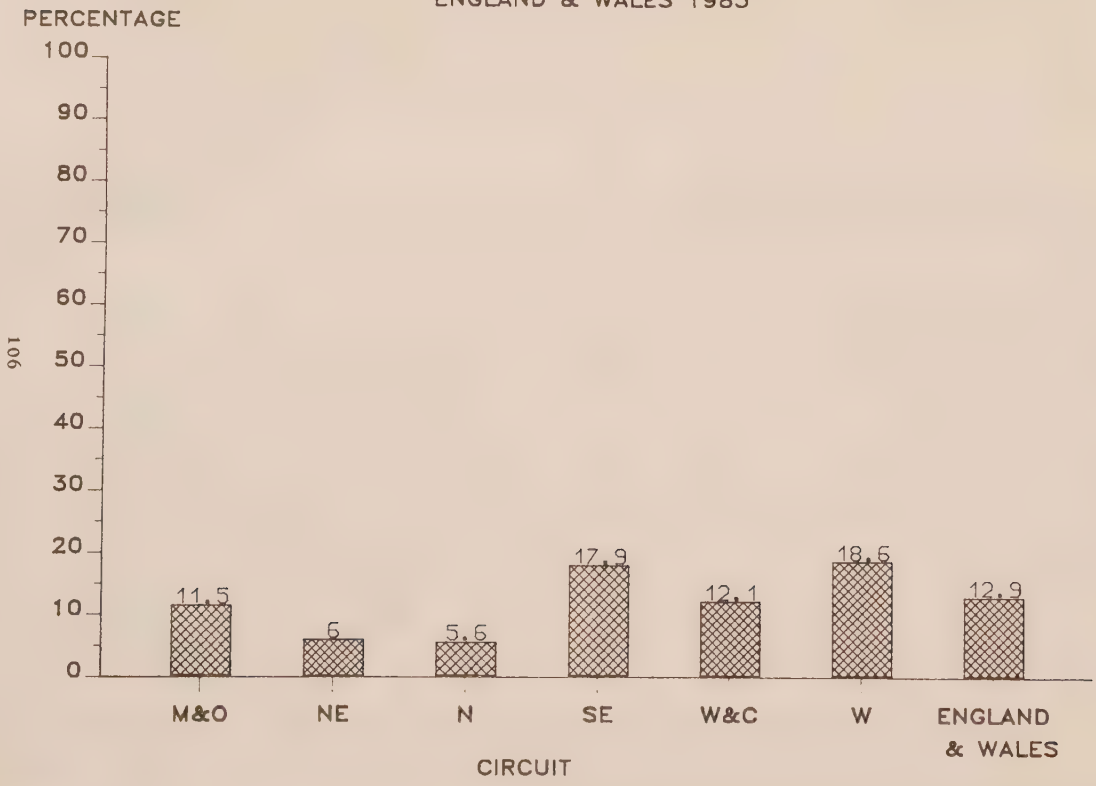


FIGURE 11.1 COUNTY COURT:CUSTODY ORDERS

WIFE ONLY CUSTODY ORDERS AS A PERCENTAGE OF TOTAL CUSTODY ORDERS
ENGLAND & WALES 1985

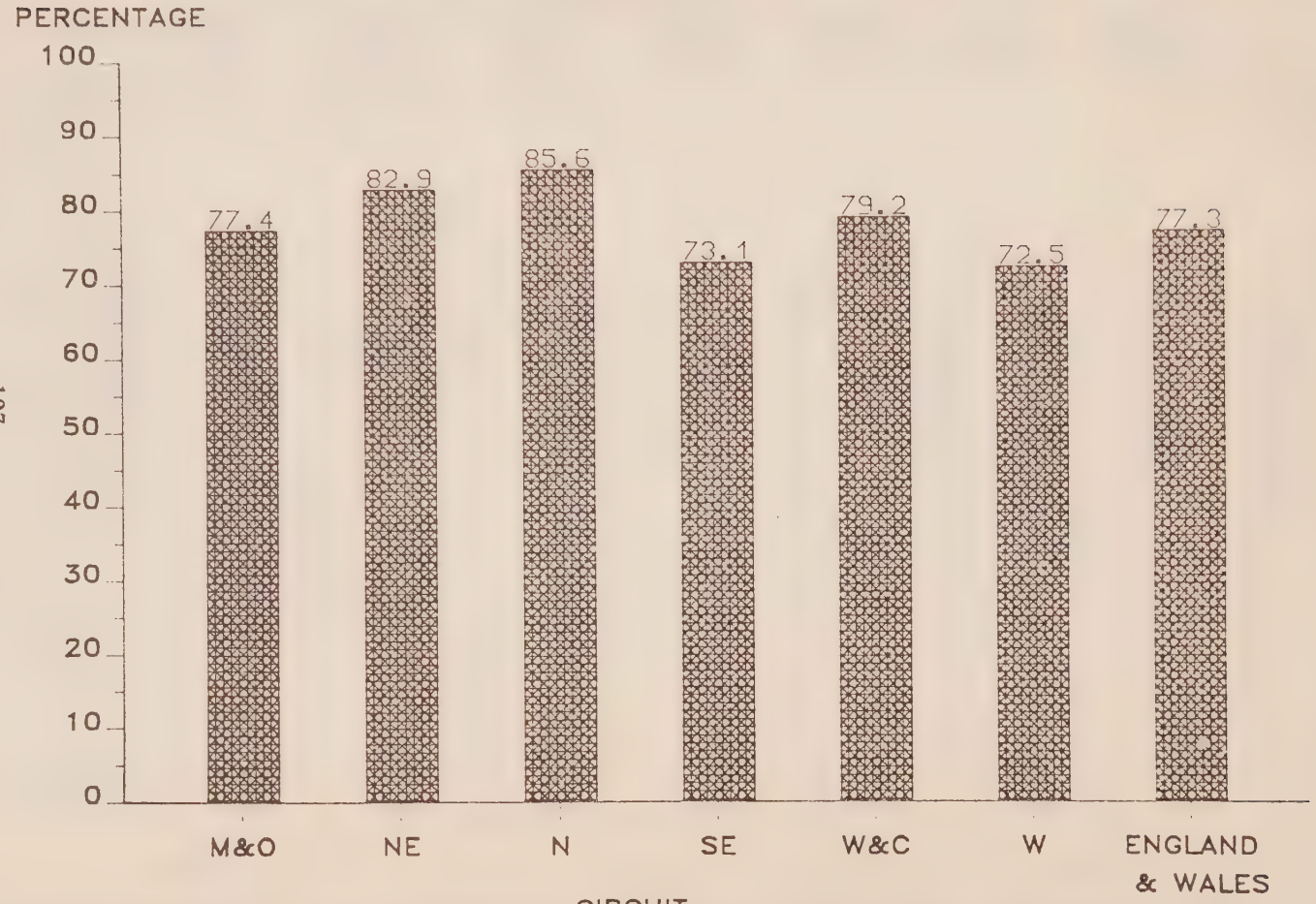


FIGURE F.3 COUNTY COURT:CUSTODY ORDERS

HUSBAND ONLY CUSTODY ORDERS AS A PERCENTAGE OF TOTAL CUSTODY ORDER

ENGLAND & WALES 1985

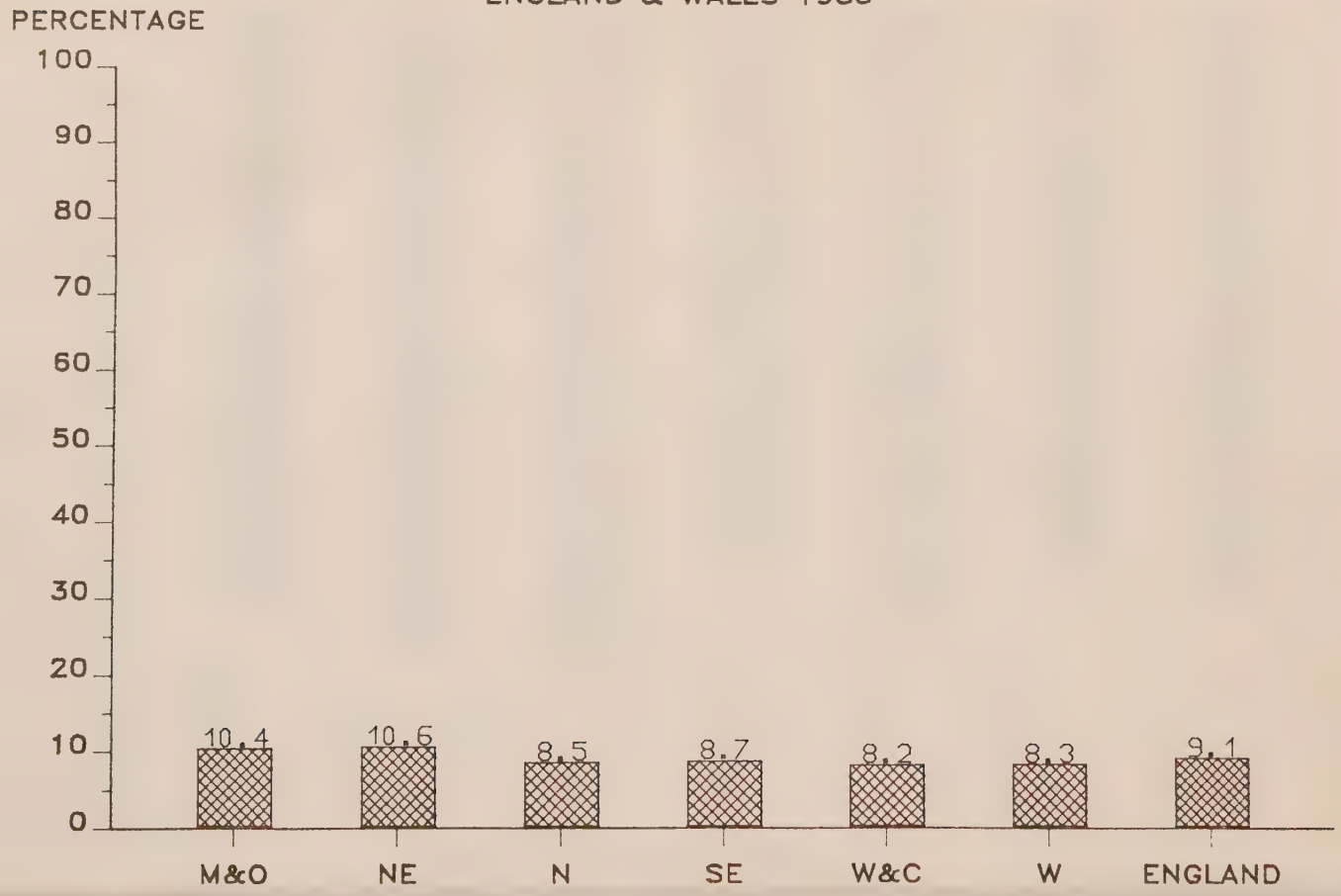
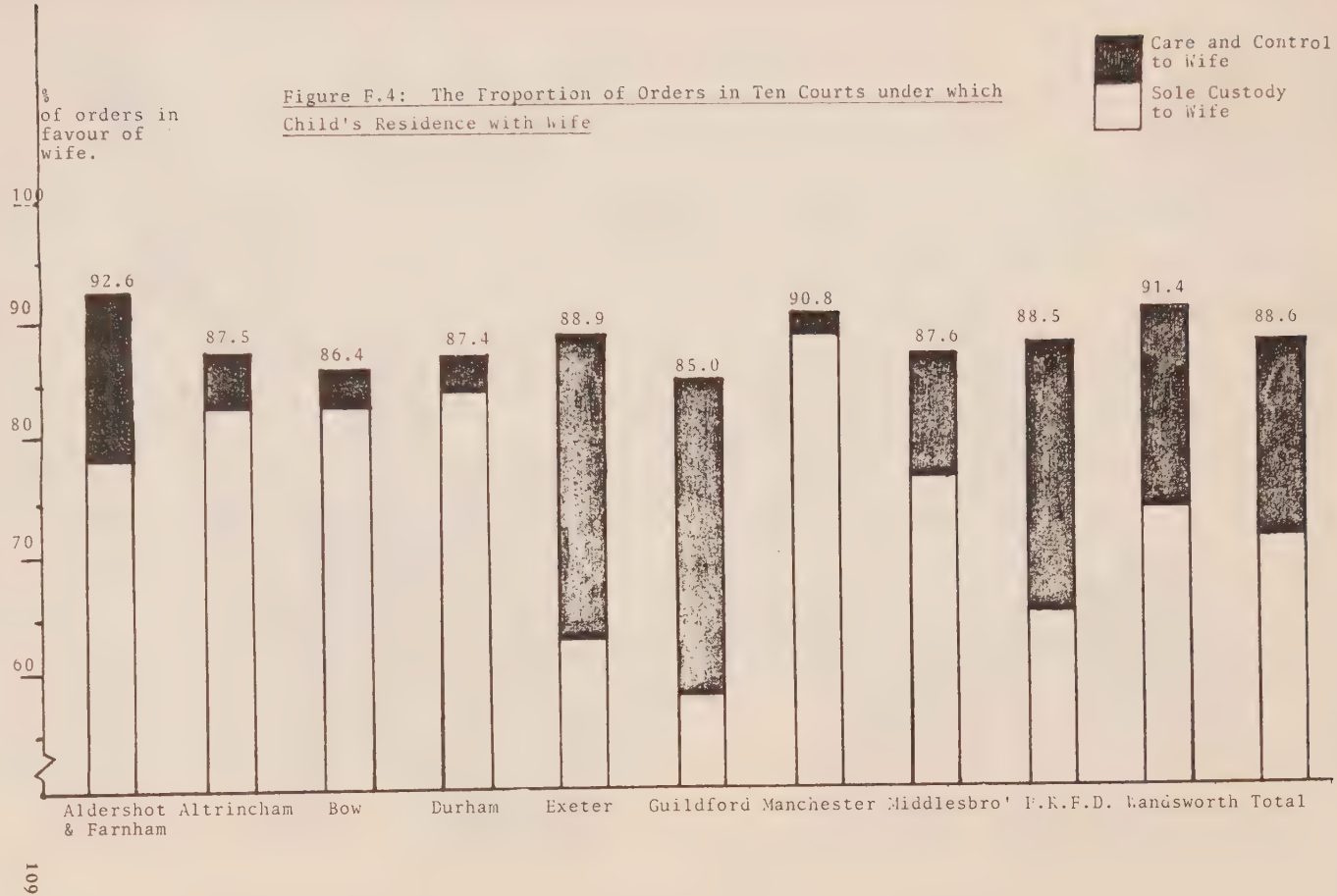


Figure F.4: The Proportion of Orders in Ten Courts under which Child's Residence with Wife



Map M .1 Court Circuits and Groups in England and Wales

N. = Northern Circuit

N(1) = Preston Group
N(2) = Liverpool Group
N(3) = Manchester Group

N.E. = North Eastern Circuit

N.E.(1) = Newcastle Group
N.E.(2) = Leeds Group
N.E.(3) = Sheffield Group

W.C. = Wales & Chester Circuit

W.C.(1) = Chester Group
W.C.(2) = Cardiff Group

W. = Western Circuit

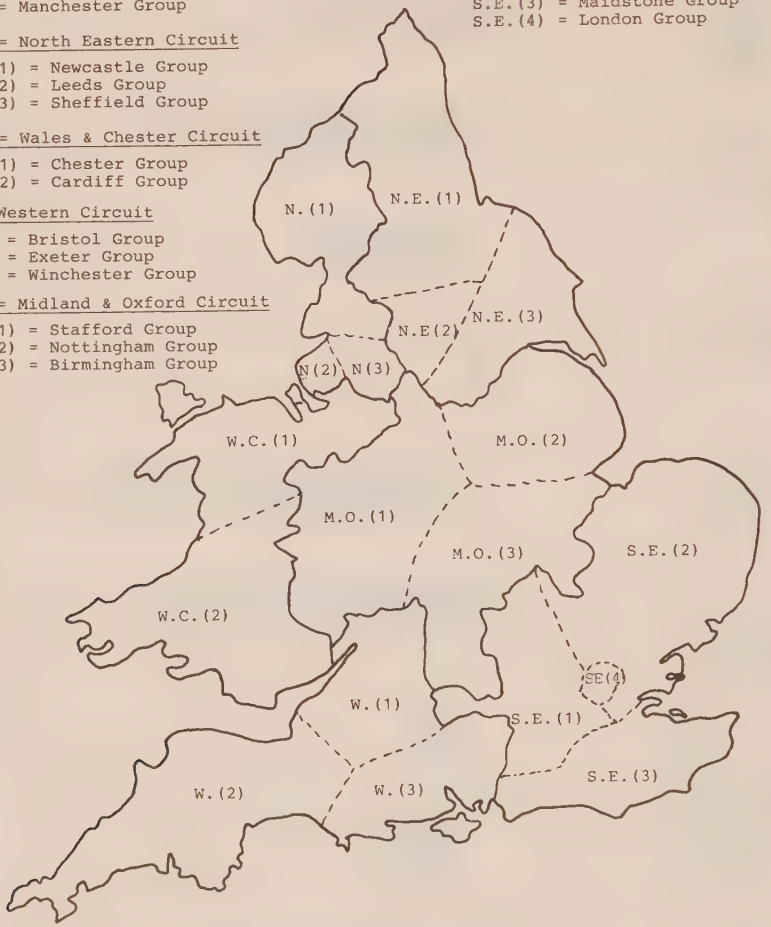
W.(1) = Bristol Group
W.(2) = Exeter Group
W.(3) = Winchester Group

M.O. = Midland & Oxford Circuit

M.O.(1) = Stafford Group
M.O.(2) = Nottingham Group
M.O.(3) = Birmingham Group

S.E. = South Eastern Circuit

S.E.(1) = Kingston Group
S.E.(2) = Chelmsford Group
S.E.(3) = Maidstone Group
S.E.(4) = London Group



Map M.2 Orders Granting Joint Custody as a Percentage of the Custody Orders Made in Each Group in 1985

Map M.3 Orders Granting Sole Custody to the Wife as a Percentage of the Custody Orders Made in Each Group in 1985

Map M.4 Orders Granting Sole Custody to the Husband as a Percentage of the Custody Orders Made in Each Group in 1985

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